(22,723.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 647.

THE DISTRICT OF COLUMBIA, PLAINTIFF IN ERROR,

vs.

JAMES T. PETTY; CHARLES W. CHURCH, ET AL., EXECUTORS OF CHARLES B. CHURCH, DECEASED; JESSE B. WILSON, AND GEORGE T. DEARING.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 9, 1911.

[12233]

1 In the Court of Appeals of the District of Columbia.

No. 2215.

DISTRICT OF COLUMBIA, &c., Appellant,
vs.
JAMES T. PETTY et al.

Supreme Court of the District of Columbia.

At Law. No. 46544.

DISTRICT OF COLUMBIA, Plaintiff,
vs.
JAMES T. PETTY, CHARLES W. CHURCH, WILLIAM A. H. CHURCH, Mary A. Church, and Joseph J. Darlington, Executors of Charles B. Church; Jesse B. Wilson, and George T. Dearing, Defendants.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, that in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to-wit:

Declaration, &c.

Filed November 9, 1903.

In the Supreme Court of the District of Columbia.

At Law. No. 46544.

DISTRICT OF COLUMBIA, Plaintiff,
vs.
JAMES T. PETTY, CHARLES B. CHURCH, JESSE B. WILSON, GEORGE T. DEARING, Defendants.

The plaintiff, the District of Columbia, a municipal corporation sues the defendants James T. Petty, Charles B. Church, Jesse B. Wilson and George T. Dearing for that, to wit: on the first day of May, A. D., 1888, the defendant James T. Petty was the Au-
2 ditor of the District of Columbia, to which office the said defendant James T. Petty before, on, from and after the said date, to wit: the first day of May, A. D., 1888 had been appointed and continually held and was the incumbent thereof until, to wit: the 15th day of August, A. D., 1903. And for that, the defendant James T. Petty, by the name "Jas. T. Petty," the defendant Charles

B. Church, by the name "Chas. B. Church," the defendant James B. Wilson and the defendant George T. Dearing, by the name "Geo. T. Dearing," on the first day of May, A. D., 1888, by their certain joint and several writing obligatory, sealed with their seals, a copy whereof is now shown to the Court here, the date whereof is the day and year last aforesaid, acknowledged themselves to be held and firmly bound unto the plaintiff, the District of Columbia, in the sum of Twenty thousand ($20,000.00) Dollars to be paid to the said District of Columbia when they, the said defendants, should be thereunto afterwards requested, which said writing obligatory was and is subject to a certain condition thereunder written whereby, after reciting to the effect following, to wit,

"Whereas, the above bounden James T. Petty has been appointed to the office of Auditor in and for the District of Columbia," it is therein set forth as follows:

"Now, therefore, the condition of said obligation is such that if said James T. Petty shall faithfully and efficiently perform all the duties of his said office, as provided for by law, and the rules and regulations from time to time duly prescribed for the government of the civil service of said District and shall well and truly pay over, disburse, and account for all moneys that shall come to his hands, as the law and orders governing said service shall require, then said obligation to be void, otherwise to remain in full force."

Yet the said defendant, James T. Petty, contrary to the form and effect of the said writing obligatory and of the conditions thereof failed and neglected to faithfully and efficiently perform all the duties of his said office as provided by law, and failed and neglected to faithfully and efficiently observe the said rules and regulations, and failed and neglected to truly pay over, disburse and account for all moneys that came to his hands, as the law and orders governing his duties and services required, in this:

First. That said defendant Petty as Auditor as aforesaid failed to account for moneys of the District of Columbia represented by checks of the amounts, dates and numbers given below which were drawn by the disbursing Officer Charles C. Rogers, of the District of Columbia, or his deputy, and countersigned by the said Petty, as auditor as aforesaid, or by the acting auditor to the order of the said Auditor of the District of Columbia, on the Treasurer of the United States, charged to the "Permit Fund, District of Columbia," which said checks should have been deposited by the said defendant, James T. Petty, as Auditor as aforesaid, in accordance with law and the rules governing the conduct of his office, with the Treasurer of the United States, to the credit of the appropriation "Improvements and Repairs, District of Columbia, Assessment and Permit Work;" but said checks were not so deposited, but were en-

3 dorsed by the said Petty as Auditor as aforesaid and afterwards cashed at the Central National Bank of Washington, D. C., and the proceeds of the said checks so cashed were never in any manner paid or accounted for to the said plaintiff or deposited in any bank or in the Treasury of the United States to its credit.

Ck. No.	Date.	Amount.	Remarks.
140189.	June 12, 1902	$1,315.00	Cashed June 19, 1902.
143574.	July 14, 1902	1,197.75	Cashed July 18, 1902.
146101.	August 20, 1902	1,412.28	Cashed August 23, 1902.
147498.	August 27, 1902	1,132.49	Cashed September 2, 1902.
148358.	September 20, 1902	2,693.80	Cashed September 29, 1902.
153705.	October 23, 1902	3,821.59	Cashed November 23, 1902.
159014.	December 3, 1902	3,020.91	Cashed December 17, 1902.
166460.	February 9, 1903	2,770.11	Cashed February 24, 1903.
169304.	February 21, 1903	2,402.31	Cashed April 8, 1903
173116.	March 30, 1903	3,241.25	Cashed May 4, 1903.

Second. The said defendant Petty as Auditor as aforesaid failed to account for moneys of the District of Columbia represented by checks of the amounts, dates and numbers given below which were drawn by the Disbursing Officer of the District of Columbia, Charles C. Rogers, or his deputy, and countersigned by the said Petty, as Auditor as aforesaid, or by the Acting Auditor on the Treasurer of the United States, to the order of the said James T. Petty, Auditor as aforesaid, and charged to various appropriations of the District of Columbia, which checks were endorsed by the said James T. Petty, as Auditor as aforesaid, and should, in accordance with law and the rules and regulations aforesaid, have been deposited in the Traders' National Bank of Washington, D. C., as reimbursements of the Deposit and Assessment Fund; but the said checks were not so deposited, but, after being endorsed by the Auditor as aforesaid, were cashed at the Central National Bank of Washington, D. C., and the proceeds of the said checks so cashed were never in any manner paid or accounted for to the said plaintiff.

Ck. No.	Date.	Amount.	Remarks.
55309.	March 7, 1900	$1,510.03	Cashed March 19, 1900.
81507.	December 4, 1900	3.04	Cashed January 28, 1901.
81602.	December 7, 1900	2,627.24	Cashed January 28, 1901.
81751.	December 13, 1900	1,237.10	Cashed January 28, 1901.
95079.	April 9, 1901	1,916.52	Cashed April 27, 1901.
98382.	May 13, 1901	2,778.52	Cashed May 18, 1901.
101420.	June 6, 1901	1,491.28	Cashed July 1, 1901.
102994.	June 20, 1901	1,643.94	Cashed July 1, 1901.
108282.	August 28, 1901	1,943.44	Cashed November 2, 1901.
122883.	January 8, 1902	1,272.32	Cashed February 14, 1902.
122932.	January 10, 1902	809.39	Cashed February 14, 1902.
136148.	April 25, 1902	751.16	Cashed May 5, 1902.
144772.	July 26, 1902	1,166.23	Cashed August 12, 1902.
148210.	September 16, 1902	1,354.40	Cashed September 22, 1902.
151831.	October 11, 1902	1,169.77	Cashed October 16, 1902.

4 Third. That said defendant Petty as Auditor as aforesaid failed to account for moneys of the District of Columbia represented by checks of the amounts, dates and numbers given below drawn by said James T. Petty, Auditor as aforesaid, to the order of the said James T. Petty as Auditor as aforesaid, upon the Central National Bank of Washington, D. C., charged to the account of the said Auditor in said Bank; the said checks were intended for deposit in the Traders' National Bank of Washington, D. C., to reimburse the Deposit and Assessment Fund, where said fund was kept; but

the said checks, having been endorsed by the said James T. Petty, as Auditor as aforesaid, were not so deposited, but the same were cashed at the Central National Bank of Washington, D. C., and the proceeds thereof were never in any manner paid or accounted for to the said plaintiff.

Ck. No.	Date.	Amount.	Remarks.
3283.	July 12, 1899	$693.58	Cashed July 27, 1899.
3301.	July 21, 1899	3,721.10	Cashed August 3, 1899.
3479.	November 22, 1899	1,582.09	Cashed December 4, 1899.
3571.	January 18, 1900	1,565.83	Cashed January 24, 1900.
3607.	February 25, 1900	1,903.23	Cashed February 26, 1900.
3711.	April 7, 1900	2,347.07	Cashed April 11, 1900.
3889.	July 12, 1900	3,365.12	Cashed July 13, 1900.
4172.	February 20, 1901	2,282.79	Cashed March 19, 1901.
4329.	June 18, 1901	770.17	Cashed June 29, 1901.

Fourth. That the said defendant Petty, as Auditor as aforesaid, failed to account for moneys of the District of Columbia represented by checks of the amounts, dates and numbers given below drawn by the said James T. Petty, as Auditor as aforesaid, the first three upon the Central National Bank of Washington, D. C., and the last three upon the National Capital Bank of Washington, D. C., all of said checks being payable to the order of the said James T. Petty, as Auditor as aforesaid; that the said checks drawn to him as Auditor as aforesaid, should have been deposited at the said banks to the credit of the said Petty, as Auditor as aforesaid; but the said checks were not so deposited, but having been endorsed by the said Petty as Auditor as aforesaid, were cashed at the Central National Bank of Washington, D. C., and the proceeds thereof were never in any manner paid or accounted for to the said plaintiff.

Ch. No.	Date.	Amount.	Remarks.
3498.	December 1, 1899	$475.00	Cashed, December 1, 1899.
3998.	September 24, 1900	$8,009.00	Cashed, November 7, 1900.
3721.	April 17th, 1900	$2,000.00	Cashed.
864.	June 7, 1899	$192.73	Cashed, June 22, 1899.
870.	June 14th, 1899	$369.92	Cashed, June 22, 1899.
921.	September 27, 1899	$2,000 00	Cashed.

Fifth. That the defendant Petty, as Auditor as aforesaid, failed to account for moneys of the District of Columbia represented by checks of the amounts, dates and numbers given below, drawn by the said James T. Petty, as Auditor as aforesaid, upon the
5 Central National Bank of Washington, D. C., payable to the order of the said James T. Petty, as Disbursing Agent, Rock Creek Park, D. C.; that the said checks, or the proceeds thereof, were used by the said Petty in his capacity as such disbursing agent, and the said checks so drawn by him as Auditor were drawn without authority of law, and the proceeds thereof were never in any manner repaid or accounted for to the said plaintiff.

Ch. No.	Date.	Amount.	Remarks.
4599.	March 18, 1902	$666.58	May 20, 1902.
4613.	April 19, 1902	$721.39	Cashed.

contrary to the form and effect of the said writing obligatory, and of the said condition thereof; whereby an action has accrued to the

plaintiff to demand and have of and from the defendants the said sum of Twenty thousand dollars ($20,000.00) yet the defendants, although often requested so to do, have not as yet paid the said sum of Twenty Thousand Dollars ($20,000.00) but they to do this have heretofore wholly refused and still do refuse, to the damage of the plaintiff of Twenty Thousand Dollars ($20,000.00), and thereupon it brings this suit and claims said sum with interest and costs.

A. B. DUVALL,
E. H. THOMAS,
Attorneys for Plaintiff.

Notice to Plead.

The defendants are to plead hereto on or before the twentieth day, exclusive of Sundays and legal holidays, occurring after the day of the service hereof; otherwise judgment.

A. B. DUVALL,
E. H. THOMAS,
Attorneys for Plaintiffs.

(*Copy of Bond.*)

Know all men by these presents:

That we, James T. Petty, Chas. B. Church, Jesse B. Wilson and Geo. T. Dearing, of the District of Columbia, are held and firmly bound unto the District of Columbia, in the sum of Twenty Thousand Dollars, lawful money of the United States of America, to be paid to the said District of Columbia, or to the certain attorney, successor, or assigns thereof; for which payment, well and truly to be made, we and each of us do bind ourselves, and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals. Dated this 1st day of May, A. D. one thousand eight hundred and eighty-eight.

Whereas, the above bounden James T. Petty has been appointed to the office of Auditor in and for the District of Columbia:

6 Now, therefore, the condition of said obligation is such that if the said James T. Petty shall faithfully and efficiently perform all the duties of his said office, as provided for by law, and the rules and regulations from time to time duly prescribed for the government of the civil service of said District; and shall well and truly pay over, disburse, and account for all moneys that shall come to his hands, as the law and orders governing said service shall require, then said obligation to be void, otherwise to remain in full force.

JAS. T. PETTY. [SEAL.]
CHAS. B. CHURCH. [SEAL.]
JESSE B. WILSON. [SEAL.]
GEO. T. DEARING. [SEAL.]

Signed and sealed in the presence of—
SAM'L OURAND.
H. J. CALDWELL.
FRANK A. SELL.
GEO. A. THOMAS.

Approved May 1, 1888, W. B. Webb, Comm'r D. C. Approved May 2, 1888, S. E. Wheatley, Comm'r D. C. Approved May 2, 1888, Chas. W. Raymond, Major of Engineers, Eng'r Comm'r D. C.

Demurrer.

Filed January 22, 1904.

* * * * * * *

The defendants Charles B. Church, Jesse B. Wilson, and George T. Dearing say that the declaration in the above entitled cause is bad in substance.

J. J. DARLINGTON,
RALSTON & SIDDONS,
Attorneys.

Among the points of law intended to be argued in support of the above demurrer is, that there is no law, nor any rule or regulation pleaded, under which the defendant Petty was chargeable with the custody of, or otherwise accountable for, any of the moneys in the said declaration mentioned.

Supreme Court of the District of Columbia.

FRIDAY, *February* 16, 1906.

Session resumed pursuant to adjournment, Mr. Justice Wright presiding.

* * * * * * *

Upon consideration of the demurrers of the defendants filed herein, it is ordered that the said demurrers be and the same are hereby sustained, with leave to the plaintiff to amend its declaration as it may be advised within thirty (30) days.

7 FRIDAY, *March* 16, 1906.

Session resumed pursuant to adjournment, Mr. Justice Wright presiding.

* * * * * * *

Upon motion of the plaintiff, the time within which to amend the declaration in this cause is further extended for the period of fifteen (15) days from this date.

Amended Declaration.

Filed December 12, 1906.

* * * * * * *

Now comes the plaintiff, the District of Columbia, by leave of Court first had and obtained, — amends its declaration filed in this cause by adding thereto the following count, viz:

The plaintiff, the District of Columbia, a municipal corporation, sues the defendants James T. Petty, Charles B. Church, Jesse B. Wilson, and George T. Dearing, for that the Mayor of the City of Washington, by and with the consent of the Board of Aldermen thereof, *were* authorized to appoint an Auditor and a Comptroller for said City by Act of Congress approved July 7, 1870, (16 Statutes, p. 191, Sec. 5); and the said Act provided that it shall be the duty of the Auditor to audit all accounts against the said corporation, to certify the same, when found correct, to the comptroller and to retain the originals of all contracts made and orders given for all descriptions of work or improvements by the corporation aforesaid; that it shall be the duty of the comptroller to keep an exact account of all warrants issued in the manner hereinafter provided for, and of all taxes levied by the corporation, under their respective heads; to countersign and keep an accurate record of all receipts for taxes or other revenue of any description whatever, given by the collector and register, such receipts not to be valid unless so countersigned, and compare the same daily with the books of said collector and register; that each and every account against the corporation of Washington, when audited and certified by the auditor, shall be paid by a warrant of the comptroller, countersigned by the mayor; and in no case shall payments be made in any other manner than provided for in this Act. But no account shall be paid, by warrant or otherwise, unless there is a fund to the credit of that particular account. The money received from any and all sources, for and on account of the corporation, shall, on the day of receipt, be deposited by the collector and register to the credit of the city of Washington, in such place as may be designated as a depository for the funds of the corporation by an act of the board of aldermen and board of common council, approved by the mayor; and such depository shall, each day that deposits are made, furnish a statement of the same to the comptroller, to be by him filed in his office.

That by Act of Congress approved February 21, 1871 (16
8 Statutes p. 419) the District of Columbia was created a body corporate for municipal purposes, with power to contract and to be contracted with, sue*d* and be sued, plea- and be impleaded, and with certain other powers and a certain form of government, as will by reference to the said Act of Congress appear; that the legislative assembly created by the said Act was given power to provide by law for the election or appointment of such ministerial officers as may be deemed necessary to carry into effect the laws of said District, to prescribe their duties, their terms of office, and the rate and manner of their compensation; and that the charter of the said city of Washington was by the said Act repealed and all officers of the said corporation abolished on and after the 1st day of June, 1871. That the Legislative Assembly of the District of Columbia continued the office of Auditor and the office of Comptroller from the said 1st day of June, 1871, for a period of forty-five days by Act passed June 2, 1871; that by Act of the Legislative Assembly approved August 23, 1871, the duties of certain officers for said District of Columbia were prescribed and it was thereby provided:

"SEC. 10. That it shall be the duty of the auditor of the District of Columbia to audit all accounts against the said District, and also to compare all accounts against the cities of Washington and Georgetown and the County of Washington created prior to the first day of June, eighteen hundred and seventy-one, and if found correct upon comparisons with the appropriations made therefor by the Legislative Assembly and the report of the special commission to audit said claims, a copy of which shall be filed with the auditor by said commission, to approve and certify the same. He shall keep a record of all bills certified by him, their amounts, the appropriation to which they are chargeable, and the date of approval. He shall retain in his office the originals of all contracts and agreements not otherwise provided for. He shall also examine and audit all accounts, not otherwise provided for in this act, and certify the amount of the same to the comptroller. He shall countersign all warrants drawn by the comptroller if, upon comparison with the amount certified by him, he shall find the same correct, and shall give bond, to be approved by the Governor, in the sum of Twenty Thousand Dollars, conditioned for the faithful discharge of the duties of his office. He shall receive an annual compensation of three thousand dollars. The deputy auditor shall perform such duties as the auditor may prescribe, and, in case of temporary disability of said auditor, from sickness or other cause, he shall act in the capacity of auditor during the continuance of such temporary disability, and no longer, and shall receive an annual compensation of two thousand dollars, and shall give bond, to be approved by the Governor, in the sum of fifteen thousand dollars, conditioned for the faithful discharge of the duties of his office.

"SEC. 11. That it shall be the duty of the comptroller of the District of Columbia to keep an exact and accurate account of all appropriations made by the Legislative Assembly, and all bonds, stocks, and certificates of indebtedness issued by said District.
9 He shall receive and file in his office a transcript of all assessments of taxes upon real estate and personal property in the District of Columbia so soon as the list shall have been made by the superintendent of assessments and taxes. He shall each year prepare from such transcript an aggregate of the amount of taxes levied, and shall compare the same with the assessment lists and the tax-book of the collector of taxes. He shall charge to the respective appropriations all payments made upon the certificate of the auditor, and submit to the Governor a monthly statement of the balance outstanding to the credit of the respective appropriations. He shall examine all accounts certified to him by the auditor, and if satisfied that they are correct, draw warrants upon the treasurer therefor, and in no case whatever shall any warrant be drawn upon any appropriations unless there is a balance to the credit thereof. He shall carefully file all receipts, and record, in a book prepared *to* that purpose, all reports of tax sales (including those to the District of Columbia) made to him by the collector. He shall each week compare the record of the register with the treasurer's record of license certificates issued, and shall keep an account of any and all transactions

which, by law, may be required to pass through his office. He shall receive a salary of four thousand dollars per annum, and give bond, to be approved by the Governor, in the sum of fifty thousand dollars, conditioned for the faithful performance of his duties."

That by Act of Congress approved June 20, 1874 (18 Statutes p. 116) all provisions of law providing for an executive, for a secretary for the District, for a legislative assembly, for a board of public works, and for a delegate in Congress in the District of Columbia were repealed, and the President of the United States was authorized to appoint a commission consisting of three persons who should, until otherwise provided by law, exercise all the power and authority then lawfully vested in the Governor or board of public works of said District, subject to certain limitations; that said Commissioners were authorized to abolish any office, consolidate two or more offices, reduce the number of employees, remove from office, and make appointment to any office authorized by law. That under said power the said Commissioners on the 11th day of August, 1876, consolidated the three offices of auditor, comptroller and deputy comptroller into that of auditor, and by a subsequent order dated August 19, 1876, the said order of the 11th day of August, 1876, was by the said Commissioners modified, and the said auditor was directed to perform the duties of Auditor and Comptroller; that by Act of Congress approved June 11, 1878 (20 Statutes p. 102) Congress created a permanent form of government for the District of Columbia, and provided that the District of Columbia should remain a municipal corporation; that all laws then in force relating to the District of Columbia not inconsistent with the provisions of said Act should remain in full force and effect, and the appointment of three Commissioners was authorized to exercise all the powers and authority vested in the then Commissioners of the said District, and by Section 4 of said Act it is provided, among other things, that all taxes collected shall be paid into the Treasury of the United States, and the same, as well as the appropriations to be made by Congress shall be disbursed for the expenses of the District on itemized voucher which shall have been audited and approved by the auditor of the District of Columbia, certified by the Commissioners or a majority of them.

That by Act of Congress approved March 3, 1881 (21 Statutes p. 466) it was provided that the accounts of all disbursements of the Commissioners of said District shall be made monthly to the accounting officers of the Treasury by the Auditor of the District of Columbia, on vouchers certified by the Commissioners as now required by law; that the same provision as last above cited is also contained in Section 3 of the Act of Congress approved July 1, 1882 (22 Statutes p. 144); that by order duly passed the Commissioners of the District of Columbia on the 8th day of December, 1882, abolished the office of comptroller and imposed the duties of said office on the said auditor, and directed said auditor to give bond in the penalty required by law; that, to wit, on the 13th day of June, 1888, the Commissioners of the District of Columbia passed

an order of the tenor and effect as shown by Exhibit A attached hereto as part hereof.

That by Act of Congress approved March 3, 1891, (26 Statutes p. 1064) the said pay clerk mentioned in paragraph four of the said order dated to wit, the 13th day of June, 1888, was recognized and described in the said Act as disbursement clerk, who was thereby authorized to pay laborers and employees of the District of Columbia with moneys advanced to him by the Commissioners in their discretion, upon pay-rolls or other vouchers audited and approved by the Auditor of the District of Columbia and certified by the Commissioners as then required by law which said pay-rolls and other vouchers the said Act required to be included in the account of the Commissioners.

That in the course of administration the Commissioners found it expedient that all work done by the District of Columbia as the result of cuts made in streets, avenues, roads, and alleys in said District be paid from a fund known as the "Deposit and Assessment Fund," which was whole cost work, and thereupon the said Commissioners on, to wit, the 6th day of February, 1897, passed an order providing in tenor and effect that for convenience in keeping the accounts in case of repairs made by the District of cuts in pavements and other work done by the District, which were paid for from private deposits, a general account be opened styled "Deposit and Assessment Fund," and that all material and labor for such works to be charged against said account and to be paid by assessments against the deposits made for such purposes.

That from, to wit, July 1st, 1878, until, to wit, the 30th day of June, 1898, except as to the duties imposed on the disbursing clerk, hereinbefore mentioned, the Auditor of the District of Columbia was and continued to be the officer in charge of the disbursements of money which came into the hands of the Commissioners of the District of Columbia. That the duties of the said Auditor
11 under the said two orders dated, to wit, the 13th day of June, 1888, and February 6, 1897, required that said Auditor should keep accounts with individual depositors of moneys which they had deposited with the Collector of Taxes to reimburse the District of Columbia for the expenses, which as whole cost work done on public streets, avenues, alleys, roads, and spaces by the District at the solicitation of individual citizens and for their benefit; that when said whole cost work was done for which said deposit was made the said Auditor was required to make requisition, approved by the Commissioners, for the amount thereof upon the Collector of Taxes, and to receive the said money so drawn on the said requisition and deposit the same in some bank or banks to his credit as Auditor of the District of Columbia, to be held to reimburse the appropriations out of which moneys had been expended to do said work or to pay direct from the said moneys in his hands as aforesaid the actual cost of labor and material for whole cost work performed as aforesaid and to return to individual depositors the amount of money to their credit and unexpended.

That prior to the said order of February 6, 1897, by Act of Con-

gress approved August 7, 1894 (28 Statutes pp. 247, 248) it was provided, among other things, that property owners who requested improvements under the permit system shall deposit in advance with the Collector of Taxes of the District of Columbia an amount equal to one-half of the estimated cost of such improvements; that all money received by the Collector of Taxes for the District of Columbia for work done upon the request of property owners shall be deposited by him in the United States Treasury to the credit of the Permit Fund; that upon completion of work done at the request of property owners, the Commissioners shall repay to the then current appropriation for Assessment and Permit work out of the Permit Fund, a sum equivalent to one-half of the cost of the work, and shall return to the depositors, from the same fund, as application may be made therefor, any surplus that may remain over and above one-half of the cost of the work; that the said repayment to the appropriation for Assessment and Permit work and the said return to the depositors from the said Permit Fund above mentioned were duties which were required of the said Auditor. That the said work was actually known as "half-cost work."

That the Collector of Taxes, upon receiving the moneys on account of the said whole cost work deposited the same in bank to his credit as Collector of Taxes, which said money was drawn from time to time therefrom upon request made by the said Auditor, and the said Commissioners directed the said Collector of Taxes to pay the amount thereof to the said Auditor, and thereupon the said Collector of Taxes paid over the same to the said Auditor taking his receipt therefor. That the said requests of the said Auditor and the said orders of the said Commissioners are too great in number to be set forth in this declaration; that moneys for the said half-cost work on deposit being received by the Collector of Taxes were by him deposited as required by law in the Treasury of the United
12 States to the credit of the Permit Fund; that upon requisitions by the Commissioners of the District of Columbia upon the Secretary of the Treasury of the United States that official advanced to the said Commissioners certain funds from time to time out of the said Permit Fund.

That by Act of Congress approved June 30, 1898, (30 Statutes p. 526) a Disbursing Officer was created for the District of Columbia, who was required to give bond to the United States for the faithful performance of the duties of his office in the disbursing and accounting, according to law, for all moneys of the United States and the District of Columbia that should come into his hands. That the said Disbursing Officer never received any of the moneys derived from the said whole-cost work, and the said money continued to be received and disbursed as aforesaid; that as to the said half-cost work from the time of the appointment of the said Disbursing Officer the same was received by the Collector of Taxes and paid by him into the Treasury of the United States to the credit of the Permit Fund and drawn therefrom on the request of the Commissioners on the said Secretary of the Treasury and placed to the credit of the said Disbursing Officer with the Treasurer of the United

States; that the duties of the said Auditor continued as to the said half-cost work under the said orders of the Commissioners and the said Statutes as aforesaid.

That it became and was the duty of the said Auditor to see upon the completion of the said half-cost work that the then current appropriation for Assessment and Permit Work was repaid to the extent of one-half of the cost of said work out of the said Permit Fund; that to accomplish this the said Auditor, with the approval of the Commissioners, stated an account in his favor as Auditor of the District of Columbia, and thereupon the said Disbursing Officer issued his check on the moneys advanced to him by the said Secretary of the Treasurer out of the said permit fund in favor of the said Auditor, who countersigned the same, and it then and there became the duty of the said Auditor from time to time, upon receipt of each check, to properly account for and disburse the said money and cause the said appropriation for Assessment and Permit Work to be reimbursed out of the said funds so received as aforesaid by him.

That by Act of Congress approved July 1, 1902 (32 Statutes p. 592) it was provided that the Auditor of the District of Columbia shall continue to prepare and countersign all checks issued by the Disbursing Officer, and no checks involving disbursements of public moneys by the Disbursing Officer shall be valid unless countersigned by the Auditor of the District of Columbia. That, to-wit: on the first day of May, A. D. 1888, the defendant James T. Petty, was the Auditor of the District of Columbia, to which office the said defendant, James T. Petty, on from and after the said date, to wit: the first day of May, A. D. 1888, had been appointed and continually held and was the incumbent thereof until, to wit: the 16th day of August, A. D. 1903. And for that, the defendant, James T. Petty,

by the name of Jas. T. Petty," the defendant Charles B.
13 Church, by the name of "Chas. B. Church," the defendant Jesse B. Wilson and the defendant George T. Deering, by the name of "Geo. T. Deering," on the first day of May, A. D. 1888, by their certain joint and several writing obligatory, sealed with their seals, a copy whereof is now shown to the court here, the date whereof is the day and year last aforesaid, acknowledged themselves to be held and firmly bound unto the plaintiff the District of Columbia, in the sum of Twenty Thousand Dollars ($20,000) to be paid to the said District of Columbia when they, the said defendants, should be thereunto afterwards requested, which said writing obligatory was and is subject to a certain condition thereunder written whereby after reciting to the effect following, to-wit:

"Whereas, the above bounden James T. Petty has been appointed to the office of Auditor in and for the District of Columbia," it is therein set forth as follows:

"Now, therefore, the conditions of said obligation is such that if said James T. Petty shall faithfully and efficiently perform all the duties of his said office, as provided by law, and the rules and regulations from time to time duly prescribed for the government of the civil service of said District; and shall well and truly pay over,

disburse, and account for all monies that shall come into his hands, as the law and orders governing said service shall require, then said obligation to be void, otherwise to remain in full force."

Yet the said defendant, James T. Petty, contrary to the form and effect of the said writing obligatory and of the conditions thereof failed and neglected to faithfully and efficiently perform all the duties of his said office as provided by law, and failed and neglected to faithfully and efficiently observe the said rules and regulations and failed and neglected to truly pay over, disburse and account for all monies that came to his hands as the law and orders governing his duties and services required, in this:

First. That said defendant Petty as Auditor as aforesaid failed to account for monies of the District of Columbia represented by checks of the amounts, dates, and numbers given below which were drawn by the disbursing officer, Charles C. Rodgers, of the District of Columbia, or his deputy, and countersigned by the said Petty, as Auditor as aforesaid, or by the acting Auditor, to the order of the said Auditor of the District of Columbia, on the Treasurer of the United States, charged to the "Permit Fund, District of Columbia," being half-cost work under the said Act of Congress approved August 7, 1894, which said checks should have been deposited by the said defendant, James T. Petty, as Auditor as aforesaid, in accordance with law and rules governing the conduct of his office with the Treasurer of the United States to the credit of the appropriation "Improvements and Repairs," District of Columbia, assessment and permit work; but said checks were not so deposited, but were endorsed by the said Petty as Auditor as aforesaid and afterwards cashed at the Central National Bank of Washington, D. C., and the proceeds of the said checks were never in any manner paid or accounted for to the said plaintiff or deposited in any bank, or in the Treasury of the United States to the credit of any appro-

14 priation for assessment and permit work as required by law and as hereinbefore set forth in this declaration.

Ck. No.	Date.	Amount.	Remarks.
140189.	June 12, 1902	$1,315.00	Cashed June 19, 1902.
143574.	July 14, 1902	$1,197.75	Cashed July 18, 1902.
146101.	August 20, 1902	$1,412.28	Cashed August 23, 1902.
147498.	August 27, 1902	$1,132.49	Cashed September 2, 1902.
148358.	September 20, 1900	$2,693.80	Cashed September 29, 1902.
153705.	October 23, 1902	$3,821.59	Cashed November 23, 1902.
159014.	December 3, 1902	$3,020.91	Cashed December 17, 1902.
166460.	February 9, 1903	$2,770.11	Cashed February 24, 1903.
169304.	February 21, 1903	$2,402.31	Cashed April 8, 1903.
173116.	March 30, 1903	$3,241.25	Cashed May 4, 1903.
	Total	$23,007.49	

Second. That the said defendant Petty as Auditor as aforesaid failed to account for moneys of the District of Columbia represented by checks of the amounts, dates and numbers given below which were drawn by the Disbursing Officer of the District of Columbia, Charles C. Rogers, or his deputy, and countersigned by said Petty, as Auditor as aforesaid, or by the acting Auditor, on the Treasurer

of the United States to the order of the said James T. Petty, Auditor as aforesaid, and charged to various appropriations of the District of Columbia, which checks were endorsed by the said James T. Petty, as Auditor as aforesaid, and should, in accordance with law and the rules and regulations as aforesaid, have been deposited in the Traders' National Bank, Washington, D. C., as reimbursements of the Deposit and Assessment Fund, whole cost work, as said work is hereinbefore set forth; but the said checks were not so deposited, but, after being endorsed by the said Auditor as aforesaid, were cashed at the Central National Bank of Washington, D. C., and the proceeds of said checks so cashed were never in any manner paid or accounted for to the plaintiff and the said deposit and Assessment Fund was not reimbursed by the said Petty as he was required to do as hereinbefore set forth:

Ck. No.	Date.	Amount.	Remarks.
55309.	March 7, 1900	$1,510.03	Cashed March 19, 1900.
81507.	December 4, 1900	$3.04	Cashed January 28, 1901.
81602.	December 7, 1900	$2,627.24	Cashed January 28, 1901.
81751.	December 13, 1900	$1,237.01	Cashed January 28, 1901.
95079.	April 9, 1901	$1,916.52	Cashed April 27, 1901.
98382.	May 13, 1901	$2,778.52	Cashed May 18, 1901.
101420.	June 6, 1901	$1,491.28	Cashed July 1, 1901.
102994.	June 20, 1901	$1,643.94	Cashed July 1, 1901.
108282.	August 28, 1901	$1,943.44	Cashed November 2, 1901.
122883.	January 8, 1902	$1,272.32	Cashed February 14, 1902.
122932.	January 10, 1902	$809.39	Cashed February 14, 1902.
136148.	April 25, 1902	$751.16	Cashed May 5, 1902.
144772.	July 26, 1902	$1,166.23	Cashed August 12, 1902.
148210.	September 16, 1902	$1,354.40	Cashed September 22, 1902.
151381.	October 11, 1902	$1,169.77	Cashed October 16, 1902.
	Total	$21,674.38	

15 Third. That said defendant Petty as Auditor as aforesaid failed to account for monies of the District of Columbia represented by checks of the amounts, dates and numbers given below drawn by the said James T. Petty, Auditor as aforesaid, to the order of the said James T. Petty as Auditor as aforesaid upon the Central National Bank of Washington, D. C., charged to the account of the said Auditor in said bank; the said checks were intended for deposit in the Traders' National Bank of Washington, D. C., to reimburse the Deposit and Assessment Fund where said fund was kept for whole-cost work as said work is hereinbefore set forth; the said checks having been endorsed by the said James T. Petty, as Auditor as aforesaid, were not so deposited, but the same were cashed at the Central National Bank of Washington, D. C., and the proceeds thereof were never in any manner paid or accounted for to the said plaintiff, and the said Deposit and Assessment Fund was not reimbursed by the said Petty as he was required to do as hereinbefore set forth.

Ck. No.	Date.	Amount.	Remarks.
3283.	July 12, 1899	$693.58	Cashed July 27, 1899.
3301.	July 21, 1899	$3,721.10	Cashed August 3, 1899.
3479.	November 22, 1899	$1,582 09	Cashed December 4, 1899.
3571.	January 18, 1900	$1,565.83	Cashed January 24, 1900.
3607.	February 25, 1900	$1,903.23	Cashed February 26, 1900.
3711.	April 7, 1900	$2,347.07	Cashed April 11, 1900.
3889.	July 12, 1900	$3,365.12	Cashed July 13, 1900.
4172.	February 20, 1901	$2,282.79	Cashed March 19, 1901.
4329.	June 18, 1901	$770.17	Cashed June 29, 1901.
	Total	$18,230.98	

Fourth. That the said defendant Petty, as Auditor as aforesaid, failed to account for moneys of the District of Columbia represented by checks of the amounts, dates, and numbers given below, drawn from funds belonging to said whole-cost work as said work is hereinbefore set forth, by the said James T. Petty, as Auditor as aforesaid, the first two upon the Central National Bank of Washington, D. C., and the last three upon the National Capital Bank of Washington, D. C., all of said checks being payable to the order of the said James T. Petty as Auditor as aforesaid; that the said checks drawn to him as Auditor as aforesaid, should have been deposited at the said banks to the credit of the said Petty, as Auditor as aforesaid, for the benefit of said whole-cost works, but the said checks were not so deposited, but having been endorsed by the said Petty as Auditor as aforesaid, were cashed at the Central National Bank of Washington, D. C., and the proceeds thereof were never in any manner paid or accounted for to the said plaintiff, and the said whole-cost work was not reimbursed by said Petty as he was
16 required to do as hereinbefore set forth.

Ch. No.	Date.	Amount.	Remarks.
3998.	September 24, 1900	$8,009.00	Cashed November 7, 1900.
3721.	April 17, 1900	$2,000.00	Cashed.
864.	June 7, 1899	$192.73	Cashed June 22, 1899.
870.	June 14, 1899	$369.92	Cashed June 22, 1899.
921.	September 27, 1899	$2,000.00	Cashed.
	Total	$12,571.65	

Fifth. That the said defendant Petty, as Auditor as aforesaid, failed to account for moneys of the District of Columbia represented by checks of the amounts, dates, and numbers given below from funds belonging to said whole-cost work, as said work is hereinbefore set forth, were unlawfully, drawn by the said James T. Petty as Auditor as aforesaid, upon the Central National Bank of Washington, D. C., payable to the order of the said James T. Petty, as disbursing agent, Rock Creek Park, D. C.; that the said checks, or the proceeds thereof, were unlawfully used by the said Petty in his capacity as such disbursing agent, and the said checks so drawn by him as Auditor were drawn without authority of law, from said funds of the District of Columbia, and the proceeds thereof were never in any manner repayed or accounted for to the said plaintiff,

and the said whole-cost work was not reimbursed by the said Petty as he was required to do as hereinbefore set forth.

Ch. No.	Date.	Amount.	Remarks.
4599.	March 18, 1902.....	$666.58	May 20, 1902.
4613.	April 19, 1902.....	$721.39	Cashed.

Contrary to the form and effect of the said writing obligatory, and of the said condition thereof whereby an action has accrued to the plaintiff to demand and have of and from the defendant the said sum of twenty thousand dollars ($20,000) yet the defendant, although often requested so to do, has not as yet paid the said sum of twenty thousand dollars ($20,000) but they to do this have heretofore wholly refused and still do refuse, to the damage of the plaintiff, of the sum of twenty thousand dollars ($20,000) and thereupon it brings this suit and claims said sum with interest and costs.

E. H. THOMAS,
Attorney for Plaintiff.

(Endorsed.)

Leave to file this amended declaration granted.

JOB BARNARD, *Justice.*

17 EXHIBIT "A."

(Copy.)

Refer in Reply to No. 3—8.

OFFICE OF THE COMMISSIONERS
OF THE DISTRICT OF COLUMBIA,
WASHINGTON, *June* 13, 1888.

Ordered:

The Collector of Taxes of the District of Columbia upon receiving a deposit for permit work, or for plumbers' or engineers' license fund, shall issue receipts therefor in duplicate, consecutively numbered, showing from whom, for what purpose, and the amount received; deliver the original receipt to the depositor, and transmit the duplicate to the Auditor of the District of Columbia. He shall not pay out the moneys thus received except upon requisition of the Auditor, approved by the Commissioners.

2. The Superintendent of Streets and the Superintendent of Sewers, respectively, shall prepare in duplicate the pay-rolls or other vouchers for services rendered or material furnished, payable from the permit fund, which, after approval by the Commissioners, as in cases of disbursements under an appropriation, shall be forwarded to the Auditor for audit and payment.

3. The Auditor of the District after receiving a pay-roll or other voucher, prepared in accordance with section 2 of this order, shall examine, approve the same if found to be correct, and make requi-

sition upon the Collector of Taxes for the amount thereof as provided in section one of this order.

4. Once a month, upon a day regularly set apart for the purpose, the pay clerk of the Auditor's office shall take the rolls thus prepared, with the money necessary to meet the same, repair to the places where the work is being done, and, after proper identification, and receipt given, pay in cash to each claimant the amount found to be due. He shall give bond, with approved security in the sum of five thousand dollars ($5,000.) for the faithful performance of the duties required of him.

5. The Auditor of the District shall open an account with the Collector of Taxes, D. C., debiting the balances turned over by the late Collector, May 4, 1888, on account of permit and license funds, and all subsequent deposits, and crediting the requisitions honored by the Collector in accordance with section one of this order.

6. The Auditor, D. C., shall debit himself with the moneys received from the Collector of Taxes upon requisition made as provided in section one and credit himself with payments upon vouchers duly certified and approved as in sections two and seven of this order.

7. After the work for which a deposit has been made has been completed and paid for, the Auditor shall state the account with the depositor, make requisition as in section one for any balance
18 that may appear in his favor, and repay the same upon presentation of the original certificate of deposit.

The receipt of the depositor upon the original certificate, for the amount thus repaid, shall be the Auditor's voucher for such repayment.

Official copy furnished the Auditor, D. C.

By order:

(Signed) W. TINDALL, *Secretary.*

S. R.

Demurrer of Church and Dearing to Amended Declaration.

Filed March 9, 1907.

* * * * * * *

The defendants Charles B. Church and George T. Dearing say that the declaration in the above entitled cause is bad in substance.

J. J. DARLINGTON,
Attorney for Defendants Church and Dearing.

NOTE.—Among the points of law intended to be argued in support of the above demurrer is that there is no law, nor is any rule or regulation duly prescribed for the government of the Civil Service in the District of Columbia pleaded, under which the defendant Petty was chargeable with the custody of or otherwise accountable for any of the moneys in the said declaration mentioned.

Demurrer of Wilson to Amended Declaration.

Filed March 18, 1907.

* * * * * * *

The defendant, Jesse B. Wilson, says that the amended declaration in the above entitled cause is bad in substance.

RALSTON & SIDDONS,
Defendant Wilson's Attorneys.

Points of Law to be Argued in Support of Demurrer.

Among the points of law intended to be argued in support of the foregoing demurrer is—

That there is no law, rule or regulation pleaded under which the defendant Petty was chargeable with the custody or otherwise accountable for any of the moneys in the said declaration mentioned; and

That prior to the alleged failure to account for moneys coming to his hands he had been relieved by law from all responsibility for the handling of money and his sureties consequently relieved from any default in connection therewith.

RALSTON & SIDDONS,
Att'ys for Def't Wilson.

19 *Demurrer of Petty to Amended Declaration.*

Filed March 27, 1907.

* * * * * * *

The defendant James T. Petty says that the amended declaration in the above entitled cause is bad in substance.

W. C. SULLIVAN, *Attorney.*

Among the points of law intended to be argued in support of the foregoing demurrer is, that there is no law, nor any rule or regulation pleaded, under which the said defendant James T. Petty was chargeable with the custody of, or otherwise accountable for, any of the moneys in the said declaration mentioned.

Supreme Court of the District of Columbia.

FRIDAY, *October* 18, 1907.

Session resumed pursuant to adjournment, Mr. Justice Wright presiding.

* * * * * * *

Upon hearing the defendants' demurrers to the plaintiff's amended declaration, it is considered that said demurrers be, and the same are hereby sustained.

Opinion.

Filed October 18, 1907.

* * * * * * *

The clause in the bond "as the law and orders governing said "service shall require" does not refer to the manner in which monies may have come *into* the hands of the Auditor, but rather to the manner and method of *accounting* for it; that is, the purpose of the bond is primarily to hold the Auditor for *all* public monies received by him, and secondarily to require him to account according to whatever, if any, system of accounting happened to be provided for by "the law and orders governing said service" (of accounting); it is not the intent of the bond to exempt the auditor from liability for monies received according to the custom and routine of his office, although not according to the detail of some written law or order.

But it is necessary to the statement of a cause of action that the declaration set forth that the months for which it is claimed he failed to account, "came into his hands"; there is nothing in the first, second, third and fourth paragraphs of the declaration which shows that the monies were ever either actually or constructively in the possession of the defendant.

The following appears in the fifth paragraph:

20 "That the said checks *or* the proceeds thereof, were unlaw-
"fully used by the said Petty * * *"

this adoption of the disjunctive is empty: it charges neither that he used the checks, nor that he used the proceeds; moreover, the phrase "were unlawfully used by the said Petty in his capacity as "such disbursing agent," is no more than a conclusion of law, not an averment of fact; if he did make use of checks or proceeds, the manner of the use should be set out; the opinion of the Court may then be taken as to whether such use was unlawful; but as it stands, the entire sentence first quoted contains no averment of fact, and is therefore to be disregarded on demurrer.

There appearing in none of the paragraphs any direct averment that the defendant Petty ever had the monies in his possession, and no averment of facts from which that conclusion follows, the demurrer must be sustained.

WRIGHT.

Suggestion of Death of Charles B. Church, &c.

Filed January 5, 1909.

* * * * * * *

Now comes the plaintiff, District of Columbia, by its attorney E. H. Thomas, and suggests the death of the defendant Charles B. Church on April 26th, 1908, leaving a last will and testament which has

been duly probated and admitted to record, in proceedings 15,281 of this Court, holding probate term, whereby Charles W. Church, William A. H. Church, Mary A. Church and Joseph J. Darlington are appointed executors, all of whom have qualified.

And said plaintiff further moves the Court that an order be passed making the said Charles W. Church, William A. H. Church, Mary A. Church and Joseph J. Darlington, Executors, parties to this suit and process be issued against them.

E. H. THOMAS,
Attorney for Plaintiff.

Supreme Court of the District of Columbia.

TUESDAY, *January 5th*, 1909.

Session resumed pursuant to adjournment, Hon. Harry M. Clabaugh, Chief Justice, presiding.

* * * * * * *

Comes now the plaintiff by its attorney Mr. E. H. Thomas, and suggests the death of the defendant herein Charles B. Church, and showing to the court that Charles W. Church, William A. H. Church, Mary A. Church and Joseph J. Darlington, have duly qualified as executors of the Estate of Charles B. Church, deceased, moves that said executors be made parties defendant; whereupon, it is
21 ordered that said executors be, and are hereby made parties defendant in the place and stead of said Charles B. Church, deceased. Further, leave is hereby granted plaintiff to forthwith file an amendment to the amended declaration herein.

Amendment to Amended Declaration.

Filed January 5, 1909.

* * * * * * *

Now comes the plaintiff, District of Columbia, by leave of Court first had and obtained, and amends its amended declaration filed in this cause as follows:

1. Amend the paragraph in said amended declaration denominated "First" by adding after the word "Columbia" in the third lien thereof the words "which came into his hands."

2. Amend the paragraph in said amended declaration denominated "Second" by adding after the word "Columbia" in the second line thereof the words "which came into his hands."

3. Amend the paragraph in said amended declaration denominated "Third" by adding after the word "Columbia" in the second line thereof the words "which came into his hands."

4. Amend the paragraph in said amended declaration denominated "Fourth" by adding after the word "Columbia" at the end of the second line thereof the words "which came into his hands."

5. Amend the paragraph in said amended declaration denomi-

nated "Fifth" by adding after the word "Columbia" in the second line thereof the words "which came into his hands."

6. Amend the paragraph in said amended declaration denominated "Fifth" as follows: Strike out the word "or" in the phrase "that said checks or proceeds were unlawfully used" and insert in lieu thereof the word "and," so that the said phrase shall read "that said checks and proceeds were unlawfully used," in the 8th & 9th lines of said paragraph of amended declaration.

E. H. THOMAS,
Attorney for Plaintiff.

Motion of Petty to Strike Out Leave to Amend, &c.

Filed April 21, 1909.

* * * * * * *

Now comes the defendant James T. Petty, appearing by his attorney specially for this purpose and for no other, and moves the Court to vacate the order passed in the above cause on the 5th day of January, 1909, granting the plaintiff leave to amend, upon the following grounds:

1. Because said motion was granted without notice to this defendant, and without opportunity to be heard.

22 2. Because of the rendition of a final judgment in said cause against the plaintiff on, to wit, the 18th day of October, 1907, or more than three terms before the passage of the said order of January 5th, 1909, which judgment was not followed by any other or further proceeding in the cause during the term in which it was rendered nor for a long time to wit, for more than a year thereafter.

3. Because there was and is no cause pending in this Court in which any such order could be granted.

4. Because the Court was without jurisdiction to pass any such order.

5. Because the said order was improvidently granted.

W. C. SULLIVAN,
Attorney for Defendant James T. Petty, Appearing Specially for the Purpose of This Motion and for no Other Purpose.

DISTRICT OF COLUMBIA, *ss:*

I, James T. Petty, on oath say that no notice was given to me, or to anyone in my behalf, of any application to the court for an order granting leave to amend the declaration in the case of District of Columbia vs. James T. Petty et al., Law No. 46,544, subsequently to the judgment in my favor rendered in said cause, on, to wit, the 18th day of October, 1907, and that my first notice of said amendment, or of any application therefor, was obtained by me from the an-

nouncement in the newspapers that the said amendment had been granted.

JAMES T. PETTY.

Subscribed and sworn to before me this 20" day of January, A. D. 1909.

[SEAL.] IRWIN H. LINTON,
Notary Public, D. C.

E. H. Thomas, Esq., Attorney for Plaintiff:

Please take notice that on Friday, the 23rd day of April, A. D. 1909, at ten o'clock A. M., or so soon thereafter as counsel can be heard, the foregoing motion to vacate the order granting leave to amend will be presented to the Court for its action.

W. C. SULLIVAN,
Attorney for Defendant James T. Petty, Appearing Specially for the Purpose of This Motion and for no Other Purpose.

Jan'y 27, 1909.

Service of above acknowledged.

E. H. THOMAS, *For* Def't.

23 *Motion of Dearing to Strike Out Leave to Amend, &c.*

Filed April 21, 1909.

* * * * * * *

Now comes the defendant George T. Dearing, appearing by his attorney specially for this purpose and for no other, and moves the Court to vacate the order passed in the above cause on the 5th day of January, 1909, granting the plaintiff leave to amend, upon the following grounds:

1. Because said motion was granted without notice to this defendant, and without opportunity to be heard.

2. Because of the rendition of a final judgment in said cause against the plaintiff on, to wit, the 18th day of October, 1907, or more than three terms before the passage of the said order of January 5th, 1909, which judgment was not followed by any other or further proceeding nor for a long time, to wit, for more than a year thereafter

3 Because there was and is no cause pending in this Court in which any such order could be granted.

4. Because the Court was without jurisdiction to pass any such order.

5 Because the said order was improvidently granted.

J. J. DARLINGTON,
Attorney for Defendant George T. Dearing, Appearing Specially for the Purpose of This Motion and for No Other Purpose.

DISTRICT OF COLUMBIA, *ss:*

I, George T. Dearing, on oath say that no notice was given to me, or to anyone in my behalf, of any application to the court for an order granting leave to amend the declaration in the case of District of Columbia vs. James T. Petty et al., Law No. 46,544, subsequently to the judgment in my favor rendered in said cause, on, to wit, the 18th day of October, 1907, and that my first notice of said amendment, or of any application therefor, was obtained by me from the announcement in the newspapers that the said amendment had been granted.

GEO. T. DEARING.

Subscribed and sworn to before me this 23rd day of January, A. D. 1909.

[SEAL.] WALTER E. HILTON,
Notary Public, D. C.

E. H. Thomas, Esq., Attorney for Plaintiff:

Please take notice that on Friday, the 23rd day of April, 1909, at ten o'clock A. M., or so soon thereafter as counsel can be
24 heard, the foregoing motion to vacate the order granting leave to amend will be presented to the Court for its action.

J. J. DARLINGTON,
Attorney for Defendant George T. Dearing, Appearing Specially for the Purpose of This Motion and for No Other Purpose.

Jan'y 27, 1909.

Service of above acknowledged.

E. H. THOMAS, *For* Def't.

Supreme Court of the District of Columbia.

FRIDAY, *April 30th,* 1909.

Session resumed pursuant to adjournment, Hon. Harry M. Clabaugh, Chief Justice presiding.

* * * * * * *

Upon consideration of the motions filed herein by the defendants James T. Petty and George T. Dearing, to vacate the order of court entered herein on the 5th day of January, 1909, granting the plaintiff leave to amend, it is ordered that said motions be, and the same hereby are over-ruled, with leave to said defendants to plead or demur as advised, within ten days hereof.

Demurrer of George T. Dearing.

Filed May 10, 1909.

* * * * * * *

The defendant George T. Dearing says that the plaintiff's declaration as amended is bad in substance.

J. J. DARLINGTON,
Attorney for Defendant George T. Dearing.

NOTE.—One of the matters of law intended to be argued on the hearing of the foregoing demurrer is, that there is no law, nor is there any rule or regulation duly prescribed for the government of the civil service of the District of Columbia pleaded, under which the defendant James T. Petty was chargeable with or authorized to receive or have the custody of any of the moneys in said declaration mentioned, or which required him to pay over, disburse or account for the same.

J. J. DARLINGTON,
Attorney for the Defendant George T. Dearing.

Demurrer of James T. Petty.

Filed May 10, 1909.

* * * * * * *

The defendant James T. Petty says that the plaintiff's declaration as amended is bad in substance.

W. C. SULLIVAN,
Attorney for Defendant James T. Petty.

25 NOTE.—One of the matters of law intended to be argued on the hearing of the foregoing demurrer is, that there is no law, nor is there any rule or regulation duly prescribed for the government of the civil service of the District of Columbia pleaded, under which the defendant James T. Petty was chargeable with or authorized to receive or have the custody of any of the moneys in the said declaration mentioned, or which required him to pay over, disburse or account for the same.

W. C. SULLIVAN,
Attorney for Defendant James T. Petty.

Demurrer of Jesse B. Wilson.

Filed February 24, 1910.

* * * * * * *

The defendant, Jesse B. Wilson, says that the plaintiff's declaration as amended is bad in substance.

RALSTON, SIDDONS & RICHARDSON,
Attorney- for Defendant Jesse B. Wilson.

NOTE.—One of the matters of law intended to be argued on the hearing of the foregoing demurrer is, that there is no law, nor is there any rule or regulation duly prescribed for the government of the civil service of the District of Columbia pleaded, under which the defendant James T. Petty was chargeable with, or authorized to receive or have the custody of any of the moneys in the said declaration mentioned, or which required him to pay over, disburse or account for the same.

RALSTON, SIDDONS & RICHARDSON,
Attorney- for Defendant Jesse B. Wilson.

Demurrer of Charles W. Church et al., Executors.

Filed March 4, 1910.

* * * * * * *

The defendants Charles W. Church, William A. H. Church, Mary A. Church and Joseph J. Darlington, Executors, say the plaintiff's declaration as amended is bad in substance.

J. J. DARLINGTON, *Attorney.*

Among the matters of law intended to be argued in support of the foregoing demurrer is that there is no law, nor any prescribed rule or regulation pleaded, under which the defendant was chargeable with the custody of or was accountable for, the checks or moneys, or any of them, in the declaration mentioned.

J. J. DARLINGTON,
Attorney for Defendant Executors.

26 Supreme Court of the District of Columbia.

FRIDAY, *March 4th*, 1910.

Session resumed pursuant to adjournment, Hon. Harry M. Clabaugh, Chief Justice, presiding.

* * * * * * *

Now come on for hearing the demurrer of the defendant James T. Petty, filed herein May 10th, 1909, the demurrer of the defendant George T. Dearing; the demurrer of the defendant Jesse B. Wilson and the demurrer of defendants Charles W. Church, William A. H. Church, Mary A. Church and Joseph J. Darlington, Executors; to the plaintiff's declaration as amended herein; upon consideration whereof it is ordered that said demurrers be and they are hereby severally sustained.

MONDAY, *March 14th*, 1910.

Session resumed pursuant to adjournment, Hon. Harry M. Clabaugh, Chief Justice, presiding.

* * * * * * *

Upon motion of the plaintiff by its attorney, Mr. Wm. Henry White, the time within which to be heard on a motion for leave to amend the declaration herein, is hereby extended to the 18th instant inclusive.

FRIDAY, *June 17th*, 1910.

Session resumed pursuant to adjournment, Hon. Harry M. Clabaugh, Chief Justice, presiding.

* * * * * * *

No. 46544. At Law.

DISTRICT OF COLUMBIA, Plaintiff,
vs.
JAMES T. PETTY, JESSE B. WILSON, GEORGE T. DEARING, and Charles W. Church, William A. H. Church, Mary A. Church, and Joseph J. Darlington, Executors, Def'ts.

Upon consideration of the motion of plaintiff made by Mr. Wm. Henry White, one of the assistant corporation counsel, orally in open court, for leave to file a second amended declaration herein, it is ordered that said motion be and the same is hereby denied.

Whereupon, it appearing that the demurrer of the defendant James T. Petty, the demurrer of the defendant George T. Dearing, the demurrer of the defendant Jesse B. Wilson, and the demurrer of Charles W. Church, William A. H. Church, Mary A. Church and Joseph J. Darlington, Executors, were on the 4th day of March, 1910, sustained to the declaration herein as amended; it is
27 considered that this cause be, and the same is hereby dismissed and that the defendants recover of plaintiff their costs of defense to be taxed by the clerk, and have execution thereof.

From the foregoing judgment the plaintiff by its said attorney in open court notes an appeal to the Court of Appeals of the District of Columbia.

Directions to Clerk for Preparation of Transcript of Record.

Filed July 5, 1910.

The Clerk in making up the record on appeal in this case will please include the following:

1903. Nov. 9. Appearance, order declaration, notice to plead and copy of bond.
1904. Jan. 22. Demurrer.
1906. Feb. 16. Demurrer sustained and leave to plaintiff to amend.
M'ch 16. Time to amend extended fifteen days from date.
1906. Dec. 12. Leave granted plaintiff to amend declaration.
" 12. Amended declaration and Exhibit "A."

1907. M'ch 9. Demurrer of defendants Church and Dearing.
" 18. Demurrer of defendant Wilson.
" 27. Demurrer of defendant Petty.
Oct. 18. Demurrer to amended declaration sustained.
" 18. Opinion of Court.
1909. Jan. 5. Suggestion of death of defendant Church, etc.
" 5. Death of defendant Church suggested, new party substituted and leave granted plaintiff to file amendment to amended declaration.
" 5. Amendment to amended declaration.
Apr. 21. Motion of defendant Petty to strike out leave to amend, affidavit and notice.
" 21. Motion of defendant Dearing to strike out.
" 30. Motions of defendants Petty and Dearing overruled, and leave to plead over.
May 10. Demurrers of defendants Dearing and Petty.
1910. Feb. 24. Demurrer of defendant Jesse B. Wilson.
M'ch 4. Demurrers of Church and Darlington, Executors.
" 4. Demurrers to amended declaration sustained.
" Order extending time within which to apply for leave to amend.
June 17. Original motion for leave to amend filed, cause dismissed at cost of plaintiff and appeal in open court.

E. H. THOMAS,
(W. H. W.)
Corporation Counsel, Attorney for Plaintiff.

28 We hereby agree to the above designation.

W. C. SULLIVAN,
Attorney for Defendant Petty.
J. J. DARLINGTON,
For Def'ts Church & Dearing.
RALSTON, SIDDONS & RICHARDSON,
Attorneys for Defendant Jesse B. Wilson.

Memorandum.

July 4, 1910.—Time in which to file Transcript of Record in Court of Appeals extended to, and including, September 1st, 1910.

Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 52, both inclusive, to be a true and correct transcript of the record according to directions of counsel herein filed, copy of which

is made part of this transcript, in cause No. 46544 at Law, wherein District of Columbia is Plaintiff and James T. Petty et als. are defendants, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 27th day of August, 1910.

[Seal Supreme Court of the District of Columbia.]

J. R. YOUNG, *Clerk*,
By ALF. G. BUHRMAN,
Ass't Clerk.

Endorsed on cover: District of Columbia Supreme Court. No. 2215. District of Columbia, &c., appellant, vs. James T. Petty et al. Court of Appeals, District of Columbia. Filed Aug. 31, 1910. Henry W. Hodges, Clerk.

29 TUESDAY, *December 13th, A. D.* 1910.

No. 2215.

DISTRICT OF COLUMBIA, a Municipal Corporation, Appellant,
vs.
JAMES T. PETTY, CHARLES W. CHURCH, WILLIAM A. H. CHURCH et al.,

The argument in the above entitled cause was commenced by Mr. Wm. H. White, attorney for the appellant, and was continued by Messrs. J. J. Darlington and W. C. Sullivan, attorneys for the appellees, and was concluded by Mr. E. H. Thomas, attorney for the appellant.

On motion the appellant is allowed ten days to file additional authorities herein, with leave to the appellees to reply thereto if so advised.

30 In the Court of Appeals of the District of Columbia.

No. 2215.

DISTRICT OF COLUMBIA, a Municipal Corporation, Appellant,
vs.
JAMES T. PETTY, CHARLES W. CHURCH, WILLIAM A. H. CHURCH et al.

Opinion.

(Mr. Justice ROBB delivered the opinion of the Court:)

This is an appeal from a judgment of the Supreme Court of the District sustaining the demurrer to appellant's declaration in an action upon the official bond of Appellee Petty, as Auditor of the

District, demurrers to the original and first amended declaration having been previously sustained. Motion further to amend was denied.

The original declaration was filed Nov. 9, 1903, and alleged that Petty, as principal, and Church, Wilson and Deering, as sureties, executed a bond on May 1, 1888, the material part of which reads as follows:

"'Whereas, the above bounden James T. Petty has been appointed to the office of Auditor in and for the District of Columbia,' it is therein set forth as follows:

'Now, therefore, the condition of said obligation is such
31 that if said James T. Petty shall faithfully and efficiently perform all the duties of his said office, as provided for by law, and the rules and regulations from time to time duly prescribed for the government of the civil service of said District and shall well and truly pay over, disburse, and account for all moneys that shall come to his hands, as the law and orders governing said service shall require, then said obligation to be void, otherwise to remain in full force."

The original declaration alleged the failure on the part of Petty to perform "all the duties of his said office as provided by law," failure faithfully and efficiently to observe "the said rules and regulations," and failure and neglect truly "to pay over, disburse and account for all moneys that came into his hands, as the law and orders governing his duties and services required, in this:"

First, that he failed to account for moneys of the District of Columbia represented by ten checks of specified amounts and dates drawn by Charles C. Rogers, disbursing officer, or his deputy, countersigned by Petty as Auditor, or by the acting Auditor of the Treasury of the United States charged to the "Permit Fund, District of Columbia," which checks should have been deposited by Petty as Auditor, in accordance with law and the rules governing the conduct of his office, with the Treasurer of the United States to the credit of the appropriation "Improvements and Repairs, District of Columbia, Assessment and Permit Work;" that said checks were
not so deposited but were endorsed by Petty as Auditor as
32 aforesaid, cashed at the Central National Bank of Washington and their proceeds never accounted for to the District of Columbia or deposited in any bank or in the Treasury of the United States to its credit.

Second, that Petty, as Auditor, failed to account for moneys of the District represented by fifteen checks of specified dates and amounts, drawn and countersigned as above stated and charged to various appropriations of the District of Columbia and endorsed by Petty as Auditor, and which should "in accordance with law and the rules and regulations aforesaid, have been deposited in the Traders' National Bank of Washington, D. C., as reimbursements of the Deposit and Assessment Fund;" that said checks were not so deposited but after endorsement as aforesaid "were cashed at the Central National Bank of Washington, D. C., and the proceeds of

said checks so cashed were never in any manner paid or accounted for to the said plaintiff."

Third, that Petty, as Auditor, failed to account for moneys of the District of Columbia represented by nine checks of specified dates and amounts drawn by him as Auditor to his order as Auditor upon the Central National Bank of Washington, D. C., charged to the account of said Auditor in said Bank and intended for deposit in the Traders' National Bank of Washington, D. C., to reimburse the Deposit and Assessment Fund, where said Fund was kept; that said checks, after endorsement by Petty, were not so deposited but were cashed at said Central National Bank of Washington and their proceeds never paid or accounted for to the District of Columbia.

Fourth, that Petty, as Auditor, failed to account for other
33 moneys of the District of Columbia represented by six checks of specified dates and amounts drawn by him as Auditor, the first three upon said Central National Bank and the last three upon the National Capital Bank of Washington, all payable to his order as Auditor; that said checks drawn as aforesaid should have been deposited at the said banks to Petty's credit as Auditor; that they were not so deposited but, after endorsement, were cashed at the Central National Bank and the proceeds never paid or accounted for to the District of Columbia.

Fifth, that Petty, as Auditor, failed to account for other moneys of the District represented by two checks of stated dates and amounts drawn by him as Auditor upon the Central National Bank payable to his order "as disbursing Agent, Rock Creek Park, D. C.; that the said checks, or the proceeds thereof, were used by the said Petty in his capacity as such disbursing agent, and the said checks so drawn by him as Auditor were drawn without authority of law, and the proceeds thereof were never in any manner repaid or accounted for to the said plaintiff."

To this declaration a demurrer was filed by the sureties on June 22, 1902, upon the ground that there was no law, nor any rule or regulation pleaded, under which Petty was charg-able with the custody or otherwise accountable for any of the moneys mentioned in the declaration; in other words, the question raised by the first demurrer was whether, in the absence of controlling statutory provisions, it was necessary to plead the rules and regulations under
which it was claimed Petty became the custodian of and
34 accountable for the moneys in the declaration mentioned.

Judgment of the court sustaining this demurrer was entered Feb. 16, 1906, whereupon on Mar. 16, following, leave to amend was sought and obtained.

The first amended declaration was filed on Dec. 12, 1906. In this amended declaration the alleged breaches were copied verbatim from the original declaration but were preceeded by a summary of the statutes, rules and regulations thought to apply to the office of Auditor of the District of Columbia, and which will be noticed later. To this amended declaration the sureties again demurred upon the ground stated in the demurrer to the original declaration, the de-

fendant also demurring. The court, on Oct. 18, 1907, sustained the demurrer.

On Jan. 5, 1909, the death of Mr. Church, one of said sureties, was suggested and his executors were ordered to be made parties. Upon the same date leave was sought and obtained to file a second amended declaration, the amendment consisting of the addition of the words "which came into his hands" in each of the five assignments of breach, so that each of said assignments read, "that said, defendant Petty as Auditor as aforesaid failed to account for moneys of the District of Columbia which came into his hands, represented by checks of amounts, dates and numbers given below," etc., and, secondly, by striking out the word "or" in the fifth assignment of breach so that the clause in which it occurs reads "that said checks and proceeds" were used. To this declaration another demurrer was filed upon the ground previously alleged. On March 4,
35 1910, the court, after hearing, again sustained the demurrer, whereupon motion for leave to amend was again made and, on June 17, 1910, this motion was denied and judgment given for the defendants, from which judgment this appeal was taken.

Appellees make no question as to the right of the District to take the bond in suit, their sole contention being that the declaration states no breach of it. The first question, therefore, which logically presents itself is whether, in an action of this kind, where liability depends upon prescribed rules or regulations, recovery can be had unless such rules and regulations are pleaded. A careful review of the authorities leaves no room for doubt upon this question. The rule, as stated by Dillon in his work on Municipal Corporations, is that "the acts, votes and ordinances of the corporation are not public matters, and must, unless otherwise provided by statute, be pleaded and proved." 1 Dill. Mun. Corp., Sec. 83 (4th Ed.). In Robinson vs. Tramway Co., 164 Fed. 174, Judge Van Devanter, now Mr. Justice Van Devanter of the Supreme Court of the United States, said: "An ordinance is not a public statute, but a mere municipal regulation, and, to make it available in establishing a charge of negligence, it must be pleaded, like any other fact of which judicial notice will not be taken. Here it was not pleaded, and so could not be proven."

"The general rule is well settled (citing cases) that municipal ordinances and by-laws are not laws of which judicial notice
36 will be taken, but facts to be pleaded and proven. If not duly pleaded, they cannot be proven." Cyc., Vol. 28, p. 393.

In Sittgen vs. Rundle, 99 Wis. 78, damages were sought for an alleged false imprisonment, and the trial court ruled that plaintiff's arrest was without due process and that he was entitled to recover damages from the officer arresting him. In the appellate court it was argued that this ruling was erroneous owing to an ordinance of the City of Milwaukee, granting authority to policemen of that City to make arrests in cases of misdemeanor. The court said: "The ordinance was not mentioned in the pleadings or introduced in evidence, the first makes its appearance in the case when printed in appellant's brief. The obligations of courts are sufficiently bur-

densome when they are required to take cognizance of all acts granting powers to municipal corporations. They have uniformly refused to take notice of the acts and ordinances of such bodies except upon due proof. (Citations.) And the introduction of such an ordinance in evidence when not pleaded, against proper objection, is error."

In Porter vs. Waring, 69 N. Y. 250, it was said: "If the court could — judicial notice of the ordinances of a municipal corporation, it would involve consideration of all the numerous enactments, whether printed or otherwise, which the Common Council have adopted and which relate to the subject of the controversy, and the existence of many of which might be entirely unknown to the parties or their counsel."

37 While some of the cases hold that ordinances must be set out *in hæc verba*, we think the general rule to be that it is sufficient to set forth their provisions in substance. Railroad Co. vs. Ashline, Admx., 171 Ill. 313; Kip vs. Paterson, 26 N. J. L. 142; Decker vs. McSorley, 11 Wis. 91; Wagner vs. Garrett, 118 Ind. 114; Lexington vs. Woolfolk, 117 Ky. 708. They must be carefully identified, however, that they may be found without difficulty.

We will next review the history of the office of Auditor and the rules and regulations governing the same, as given in the amended declaration. The Act of July 7, 1870, (16 Stat. 191), authorized the Mayor and Aldermen of the City of Washington to appoint an Auditor and Comptroller, and made it the duty of the Auditor to audit and certify to the Comptroller all accounts against the corporation and to retain the originals of all contracts made and orders given for work and improvements by the District. It was the duty of the Comptroller to keep an account of all warrants, of all taxes levied, and all receipts for taxes given by the collector and register. The Act further provided that every account against the corporation of Washington, when audited and certified by the Auditor, should be paid by warrant of the Comptroller, countersigned by the Mayor. The Act provided, however, that all moneys received from any and all sources should be deposited by the collector and register to the credit of the City in a designated depository.

Under the Act of Feb. 21, 1871, (16 Stat. 419), the District of Columbia was created a body corporate for municipal pur-

38 poses, and the power of election and appointment of municipal officers was lodged in its legislature, the Act repealing the charter of the City of Washington and abolishing all offices of that corporation after June 7, 1871. The Act of the Legislative Assembly of Aug. 23, 1871, (Abert's Compilation, page 210), made it the duty of the Auditor to audit all accounts against the District, to keep a record of all bills certified by him and the appropriations to which they are charg-able, to certify to the Comptroller all accounts audited by him and to countersign all warrants drawn by the Comptroller if found correct. The Comptroller was to keep an account of all appropriations made by the Legislative Assembly and of all evidences of indebtedness issued by the District, to keep a transcript of all assessments of taxes, to charge to the respective ap-

propriations all payments made upon certificate of the Auditor, and to draw warrants upon the treasurer therefor if there was a balance to the credit of the particular appropriation.

The Act of June 20, 1870, (18 Stat. 116), abolished the existing form of government and established the present system. This Act authorized the Commissioners to abolish and consolidate offices and make *appropriations* thereto. The declaration alleges that the Board of Commissioners consolidated the office of Auditor and Com-troller and Deputy Comptroller by order of Aug. 11, 1876, and by order of Aug. 19, 1876, modified that order so as to continue the office of Auditor and Comptroller and appointed one person to perform the duties of both offices. Under said order of Aug. 11th, which
39 is set out in the declaration, it is provided "that the clerk in the Auditor's office, who shall be charged with the business of special assessments, shall give a bond to the District of Columbia" for the faithful performance of his duties. Said order of Aug. 19th provided that "the clerk in the Auditor's office who shall be charged with the business of collecting and accounting for special assessments shall give a bond to the District of Columbia" for the faithful performance of his duties.

The Act of June 11, 1878, (20 Stat. 102), continued the existing form of government by Commissioners and provided that all taxes should be paid into the Treasury of the United States and that the same, as well as appropriations to be made by Congress, should be disbursed for the expenses of the District on itemized vouchers audited and approved by the Auditor of the District and certified by the Commissioners or a majority of them.

The Act of Congress of March 3, 1881, (21 Stat. 466), provided that accounts of all disbursements of the Commissioners of the District should be made to the accounting officers of the Treasury by the Auditor on vouchers certified by the Commissioners as required by law. The same provision is also contained in Sec. 3 of the Act of Congress of July 1, 1882, (22 Stat. 144). These enactments were followed by an order of the Commissioners dated Dec. 8, 1882, abolishing the office of Comptroller and imposing his duties upon the Auditor.

Such was the situation when the bond was given. The
40 declaration then sets out that on June 13, 1888, the Commissioners passed an order containing seven sections. An inspection of the order, which is made a part of the declaration, shows that under Sec. 1 the collector of taxes was required, upon receiving a deposit for permit work, Etc., to give receipts therefor in duplicate, delivering the original to the depositor and transmitting the duplicate to the Auditor. This Section forbids the collector to pay out moneys thus received except upon requisition of the Auditor, approved by the Commissioners. Sec. 2 of the order required the superintendents of streets and sewers, respectively, to prepare in duplicate pay-rolls or other vouchers for services rendered or materials furnished, payable from the permit fund which, after approval by the Commissioners, were to be "forwarded to the Auditor for audit and payment." This Section, however, was followed by Sec. 3, requiring

the Auditor, after receiving a pay-roll or other voucher prepared in accordance with Sec. 2, to examine and approve the same if found correct, and make requisition upon the collector of taxes for the amount thereof as provided in Sec. 1 and by Sec. 4, specifying the manner in which these moneys should be paid, and by whom. That Section required "the pay clerk of the Auditor's office" to take the rolls thus prepared, with the money necessary to meet the same, to the place where the work was being done and to pay in cash to each claimant the amount his due. This pay clerk was required to give a bond for the faithful performance of the duties required of
41 him. Sec. 5 required the Auditor to open an account with the collector of taxes, debiting him with all deposits on account of permit work and license funds and subsequent deposits, crediting the requisitions honored by the collector. Sec. 6 required the Auditor to debit himself with moneys received from the collector of taxes, upon requisitions made as provided in Sec. 1, and to credit himself with payments upon vouchers duly certified and approved as in Sections 2 and 7. The 7th and last Section, which, however, is not here involved, required the Auditor after the completion of the work for which the deposit had been made to state an account with the depositor and make requisition for any balance or deposit, the receipt of the depositor being the Auditor's voucher for such payment.

What constituted "permit work," the deposits on account of which made up the "permit fund," is gathered from the statement in the declaration that in the course of administration "the Commissioners found it expedient that all work done by the District of Columbia as the result of cuts made in streets, avenues, roads and alleys in said District be paid from the fund known as the 'Deposit and Assessment Fund,' which was whole-cost work," done at the solicitation of individual citizens for their benefit and at their expense.

The Act of Congress of March 3, 1891, (26 Stat. 1064), provided "for one disbursing clerk," and authorized him to pay laborers and employees of the District, such payments to be made "with moneys advanced to him by the Commissioners in their discretion, upon pay-rolls or other vouchers audited and approved by the Auditor
42 of the District of Columbia, and certified by the Commissioners as now required by law." This disbursing clerk was required to give bond to the satisfaction of the Commissioners in the sum of $25,000, and it was expressly provided that he should be subordinate to the Commissioners and that they should "in every respect be responsible to the United States, the District of Columbia, and to individuals for the acts and doings of said disbursing clerk." The accounts of this disbursing clerk were to be audited by the Auditor of the District who, however, was required to forward such accounts to the Commissioners for their approval. This disbursing clerk, it is alleged in the declaration, was the officer designated in said order of June 13, 1888, as "Pay Clerk."

The Act of Aug. 7, 1894, (28 Stat. 247), provided for so-called "half-cost" work by requiring property owners desiring improvements under the permit system to deposit in advance with the col-

lector an amount equal to one-half of the cost of such improvements. Moneys thus received by the collector were to be deposited by him in the Treasury of the United States to the credit of the permit fund. Upon the completion of the work the Commissioners were required to repay the current appropriation for assessment and permit work out of such permit fund, one-half the cost of such work, and return to the depositors from the same fund any surplus remaining over and above one-half of the cost of the work. It will be noticed that this Statute was not enacted until several years after the promulgation of said order of June 13, 1888, and was authority for
43 half-cost and not whole-cost work.

The declaration alleges that on the 6th of Feb., 1897, the Commissioners passed an order providing that for convenience in keeping the account "in case of repairs made by the District of cuts in pavements and other work done by the District, which were paid for from private deposits, a general account be opened styled 'Deposit and Assessment Fund,' and that all material and labor for such works to be charged against said account and to be paid by assessments against the deposits made for such purposes."

The Act of June 30, 1898, (30 Stat. 525), provided for the appointment by the Commissioners of the District of a disbursing officer for the District, who was required to give bond in the sum of $50,000. This Act expressly provided that thereafter advances in money should be made "on the requisition of said Commissioners to the said disbursing officer instead of to the Commissioners," and required him to account for the same as then "required by law of the said Commissioners."

The only other Act necessary to be noticed is the Act of July 1, 1902, (32 Stat. 592), requiring the Auditor of the District to continue to prepare and countersign all checks issued by the disbursing officer, no check of such officer involving the disbursement of public moneys to be valid unless so countersigned.

It is of course axiomatic that while duties akin to those expressly imposed upon a bonded officer may be subsequently devolved upon him so as to charge his sureties, duties of a wholly different
44 character may not, the reason being that one class of duties may reasonably be presumed to have entered into the contemplation of the parties at the time of the execution of the bond, while the other class may not. Gasson vs. United States, 97 U. S. 584; 2 Brandt S. & G., Sec. 660. The question before us in this case, however, is not so much whether there has been a breach of any after-imposed duties on the part of the Auditor as whether, upon this record, it can be said that responsibility for the custody of the moneys mentioned in the declaration in any way devolved upon him.

It is so apparent, we think, as to render discussion unnecessary that down to the promulgation of said order of June 13, 1888, there was no law, rule or regulation making the Auditor of the District custodian or accountable for public moneys. It is insisted by the appellees that the whole-cost work, to which the "permit work" deposit mentioned in this order was devoted, was entirely unau-

thorized by law and hence that the order is not material here. We can find no statute authorizing the District to receive or expend such permit work deposits. On the contrary, the Commissioners were prohibited for contracting for improvement of streets, Etc., except in pursuance of appropriations made by law." Abert's Compilation, Chap. 19, Secs. 29, 31, Pages 201-202. The order, therefore, has no place in this inquiry as the moneys received from citizens for street improvement were not public moneys in any legal sense. The transaction was between the individuals holding the office of Commissioner and the citizens who advanced the
45 money.

The Act of 1891 making appropriation "for one disbursing clerk" provided that payments to laborers and employees should be made by such clerk with moneys advanced to him not by the Auditor but by the Commissioners. This disbursing clerk was also, under the Act, required to give bond to the United States, and was made subordinate not to the Auditor but to the Commissioners. His derelictions the Act expressly charged not to the Auditor but to the Commissioners. The Auditor was required to audit the accounts of this disbursing clerk, but again the Act placed responsibility upon the Commissioners by requiring the Auditor promptly to forward such accounts to them for approval. From 1891 to the Act of June 30, 1898, it is conceded there was no change in the method of disbursement. That Act, as noted, created a disbursing officer for the District, required him to be appointed by the Commissioners, and required him to give bond for the faithful performance of his duties "in the disbursing and accounting, according to law, for all moneys of the United States and of the District of Columbia that may come into his hands." The proviso following that advances in money should be made to the disbursing officer "instead of to the Commissioners," and that he should account for such moneys "as now required by law of said Commissioners," negatives the contention that it was then understood that advances had previously been made to the Auditor and is in affirmation of the proposition that such advances had previously been made to the Commissioners.

The declaration specifically assigns, as the breach for which
46 recovery is sought, the failure on the part of the Auditor to account for certain checks alleged to represent moneys. The exact nature of these various transactions is set out in the declaration. There was no law making it the duty of the Auditor to have the custody of or to disburse any of these moneys, nor does the declaration, as we have found, set out any prescribed rule, order, or regulation imposing said duties, or either of them, upon the Auditor. It follows, therefore, that the demurrer was rightly sustained.

The refusal of the court to permit still further amendment of the declaration is assigned as error. While it is difficult to perceive how the defect in the declaration could be overcome by amendment, we are certainly not prepared to hold that there was an abuse of discretion by the trial court in overruling the motion. Almost eight years had intervened since the filing of the original declaration. An

oral motion for leave to file a third amendment was made, unaccompanied—so far as the record discloses—by any showing of cause or by any suggestion as to the character of the proposed amendment. In the circumstances, the court was entirely justified in overruling the motion.

Judgment affirmed with costs.

Affirmed.

(Endorsed:) No. 2215. District of Columbia, a Municipal Corporation, Appellant, vs. James T. Petty, et al. Opinion of the Court per Mr. Justice Robb. Court of Appeals, District of Columbia. Filed May 1, 1911. Henry W. Hodges, Clerk.

47 MONDAY, *May 1st, A. D.* 1911.

No. 2215. April Term, 1911.

DISTRICT OF COLUMBIA, a Municipal Corporation, Appellant,
vs.
JAMES T. PETTY, CHARLES W. CHURCH, WILLIAM A. H. CHURCH, et al.

Appeal from the Supreme Court of the District of Columbia.

This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia, and was argued by counsel. On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said Supreme Court in this cause be and the same is hereby affirmed with costs.

Per Mr. JUSTICE ROBB,
May 1, 1911.

48 In the Court of Appeals of the District of Columbia.

No. 2215.

DISTRICT OF COLUMBIA, a Municipal Corporation, Appellant,
vs.
JAMES T. PETTY, CHARLES W. CHURCH, WILLIAM A. H. CHURCH, MARY A. CHURCH, and JOSEPH J. DARLINGTON, Executors of Charles B. Church; JESSE B. WILSON, and GEORGE T. DEARING, Appellees.

Petition for Writ of Error.

And now comes the District of Columbia, a municipal corporation, plaintiff herein and says:

That on or about the first day of May, 1911, the Court of Appeals of the District of Columbia entered a judgment herein in favor of

the above named defendants against the plaintiff in which judgment and the proceedings had prior thereto in this case, certain errors were committed to the prejudice of this plaintiff, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore, this plaintiff prays that a writ of error may issue in this behalf, out of the Supreme Court of the United States for the correction of errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the Supreme Court of the United States.

EDWARD H. THOMAS,
Corporation Counsel, Attorney for Plaintiff.

49 In the Court of Appeals of the District of Columbia.

No. 2215.

DISTRICT OF COLUMBIA, a Municipal Corporation, Appellant,
vs.
JAMES T. PETTY, CHARLES W. CHURCH, WILLIAM A. H. CHURCH, MARY A. CHURCH, and JOSEPH J. DARLINGTON, Executors of Charles B. Church; JESSE B. WILSON, and GEORGE T. DEARING, Appellees.

Assignment of Errors.

The plaintiff, the District of Columbia, a municipal corporation, in connection with and as part of its petition for writ of error filed herein, makes the following assignment of errors which it avers were committed by the Court in the rendition of the judgment against this plaintiff appearing of record herein, that is to say:

First, the Court erred in holding and deciding that the original declaration of the plaintiff and as amended did not state facts sufficient to constitute a cause of action against the defendants.

Second, the Court erred in holding and deciding that there is no law nor any rule or regulation pleaded under which the defendant Petty, and his sureties were chargeable with the custody of, or otherwise accountable for any of the moneys in said original declaration and the amendments thereto mentioned.

Third, the Court erred in holding and deciding that the action was founded on failure to observe the rules and regulations from time to time prescribed for the government of the civil service of the District of Columbia, and that it was necessary to plead such rules and regulations, and in failing to hold that said Petty was liable for not accounting for all moneys that came into his possession or that the purpose of the bond was to hold him for all public moneys received by him.

Fourth, the Court erred in holding and deciding that the
50 condition of the bond in suit did not cover breaches under laws and regulations enacted and in force subsequent to the execution of the bond.

Fifth, the Court erred in holding and deciding that the moneys which came into the hands of said Petty could not be disbursed except by Congressional appropriation.

Sixth, the Court erred in not holding and deciding that the bond in suit was good although not a statutory bond and that the principal and sureties were estopped to deny its validity.

Seventh, the Court erred in sustaining the demurrers of the defendants to the original declaration and the amendments thereto and in rendering judgment for the defendants.

Wherefore, the plaintiff prays that the said judgment may be reversed.

DISTRICT OF COLUMBIA,
By EDWARD H. THOMAS,
Corporation Counsel.

(Endorsed:) At Law No. 22.15. District of Columbia, a Municipal Corporation, Appellant, vs. James T. Petty, Charles W. Church, William A. H. Church, Mary A. Church, and Joseph J. Darlington, Executors of Charles B. Church, Jesse B. Wilson and George T. Dearing, Appellees. Petition for Writ of Error and Assignment of Errors. Court of Appeals, District of Columbia. Filed May 12, 1911. Henry W. Hodges, Clerk.

51 FRIDAY, *May 12th, A. D.* 1911.

No. 2215.

DISTRICT OF COLUMBIA, a Municipal Corporation, Appellant,
vs.
JAMES T. PETTY, CHARLES W. CHURCH, WILLIAM A. H. CHURCH, et al.

On motion of Mr. Wm. H. White, of counsel for the appellant, It is ordered by the Court that a writ of error to remove this cause to the Supreme Court of the United States issue.

52 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Justices of the Court of Appeals of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals before you, or some of you, between District of Columbia, a Municipal Corporation, Appellant, and James T. Petty, Charles W. Church, William A. H. Church, et al., Appellees, a manifest error hath happened, to the great damage of the said appellant as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the

same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 12th day of May, in the year of our Lord one thousand nine hundred and eleven.

[Seal Court of Appeals, District of Columbia.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

53 UNITED STATES OF AMERICA, *ss:*

To James T. Petty; Charles W. Church, William A. H. Church, Mary A. Church, and Joseph J. Darlington, Executors of Charles B. Church; Jesse B. Wilson, and George T. Dearing, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Court of Appeals of the District of Columbia, wherein District of Columbia, a municipal corporation, is plaintiff in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Seth Shepard, Chief Justice of the Court of Appeals of the District of Columbia, this 12th day of May, in the year of our Lord one thousand nine hundred and eleven.

SETH SHEPARD,
Chief Justice of the Court of Appeals of the District of Columbia.

Service acknowledged May —, 1911.

J. J. DARLINGTON,
Of Counsel for Appellees Other than Petty & Wilson.
W. C. SULLIVAN,
Counsel for Appellee Petty.
J. H. RALSTON,
Att'y for Def't Jesse B. Wilson.

[Endorsed:] Court of Appeals, District of Columbia. Filed May 12, 1911. Henry W. Hodges, Clerk.

54 Court of Appeals of the District of Columbia.

I, Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages numbered from 1 to 53 inclusive contain a true copy of the transcript of record and proceedings of said Court of Appeals in the case of District of Columbia, a municipal corporation, appellant, vs. James T. Petty, Charles W. Church, William A. H. Church, et al. No. 2215, April Term, 1911, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this 16th day of May, A. D. 1911.

[Seal Court of Appeals, District of Columbia.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Endorsed on cover: File No. 22,723. District of Columbia Court of Appeals. Term No. 647. The District of Columbia, plaintiff in error, vs. James T. Petty; Charles W. Church et al., executors of Charles B. Church, deceased; Jesse B. Wilson and George T. Dearing. Filed June 7th, 1911. File No. 22,723.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 316.

THE DISTRICT OF COLUMBIA, PLAINTIFF IN ERROR,

vs.

JAMES T. PETTY; CHARLES W. CHURCH ET AL., EXECUTORS OF CHARLES B. CHURCH, DECEASED; JESSE B. WILSON, AND GEORGE T. DEARING.

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

EDWARD H. THOMAS,
Corporation Counsel, District of Columbia,
Attorney for Plaintiff in Error.

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Authorities Cited.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1912.

No. 316.

THE DISTRICT OF COLUMBIA, PLAINTIFF IN ERROR,

vs.

JAMES T. PETTY ET AL.

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

Abstract of the Case.

This case arises on alleged error of the Court of Appeals of the District of Columbia in affirming the judgment of the Supreme Court of the District of Columbia which sustained demurrers to the original declaration and amendment thereof (R., 1 to 6, 6 to 18, 20, 24, and 25).

The plaintiff in error, the District of Columbia, a municipal corporation, filed its declaration in debt to recover $20,000 penalty of a bond dated May 1, 1888, executed by its auditor, James T. Petty, and Charles B. Church, Jesse B. Wilson, and George T. Dearing. Charles B. Church is now deceased, and his executors have been made parties defendant (R., 20).

The bond contains the following recital and condition (R., 5):

> "Whereas the above-bounden James T. Petty has been appointed to the office of Auditor in and for the District of Columbia: Now, therefore, the condition of said obligation is such that if the said James T. Petty shall faithfully and efficiently perform all the duties of his said office, as provided for by law, and the rules and regulations from time to time duly prescribed for the government of the civil service of said District; and shall well and truly pay over, disburse, and account for all moneys that shall come to his hands, as the law and orders governing said service shall require, then said obligation to be void, otherwise to remain in full force."

The declaration, original and as amended, assigns five breaches. They differ principally in that the original declaration contains no specific or detailed statement of the "rules and regulations from time to time duly prescribed for the government of the civil service of said District," as mentioned in the condition of the bond, except an averment that the defendant "failed and neglected to faithfully and efficiently observe said rules and regulations," followed by particular assignment of breaches of these and the other conditions. Non-performance of the other conditions of the bond is set out in each declaration.

Demurrers were interposed to the original declaration on the ground—

> "that there is no law, nor any rule or regulation pleaded, under which the defendant Petty was chargeable with the custody of, or otherwise accountable for, any of the moneys in the said declaration mentioned" (R., 6).

The trial court sustained the demurrers. The declaration was then amended by stating the laws under which it was sought to charge Auditor Petty and the rules and regulations prescribed by the Commissioners concerning his office.

Demurrers were again filed by all the defendants, repeating the ground for demurring stated in the demurrers to the original declaration (R., 17, 18).

These demurrers were likewise sustained in an opinion by Justice Wright (R., 19), who held that the condition of the bond that the auditor—

> "shall well and truly pay over, disburse, and account for all moneys that shall come into his hands, as the law and orders governing said service shall require."

(ignoring the ground assigned for the demurrers that the law and the rules and regulations had not been pleaded),

> "did not refer to the manner in which moneys may have come *into* the hands of the auditor, but rather to the manner and method of accounting for it; that is, the purpose of the bond is primarily to hold the auditor for *all* public money received by him, and secondly to require him to account according to whatever, if any, system of accounting happened to be provided."

The court held, however, that it was—

> "necessary that the declaration set forth that the months (moneys) for which it is claimed he failed to account, 'came into his hands;' "

and the court held this did not appear on the face of the declaration.

The declaration was again amended by adding the words "which came into his hands," and striking out the word "or" (criticised by the court) and substituting the word "and" in paragraph or breach five of the declaration as amended (R., 20, 21).

Demurrers on substantially the same grounds as before were again interposed and were sustained (R., 24, 25).

From this judgment an appeal (as provided by law) was taken to the Court of Appeals of the District of Columbia

(R., 26), where it was sustained. (See opinion, R., 28 *et seq.*, and judgment, R., 37).

Writ of error was then prayed to this honorable court (R., 37) and errors assigned (R., 38).

Whole-cost and Half-cost Work as Described by the Court of Appeals and the Commissioners.

The system known as whole-cost and half-cost work described in the amendment to the declaration existed prior to giving the bond in suit.

It first appears in the act of March 3, 1883 (22 Stat., 464), and has been continually recognized by Congress in each succeeding appropriation for every succeeding year.

The Court of Appeals partly describes it in Allman *vs.* District of Columbia, decided March 20, 1894. It is there said:

> "There is no act of Congress which provides a general system of procedure for the paving of streets and alleys and the construction of sidewalks and the assessment of charges therefor against the owners of property benefited thereby. The only statutory regulations are to be found in the annual appropriation bills in the shape of clauses following the items of appropriation for the work.
>
> "It seems that a method of making such improvements, under the name of 'permit work,' had grown up and become a regular practice of the District authorities before the same was recognized in the appropriation acts. The phrase 'permit work' was first used in the act of 1883, and occurs in each appropriation act enacted since then. In the report of the Commissioners (December, 1885, p. 170), it is thus defined: 'The permit work, in which the District pays for the materials, and the property owners for the labor.' The practice was this: Abutting property owners would petition for a specified improvement. If this came within 'current work' for which the appropriation was available, and appeared to be in the

interest of the public also, a permit was issued, and materials were furnished by the District and the labor was done at the cost of the petitioner."

Allman *vs.* District of Columbia, 3 App. D. C., 11, 12.

The report of the Commissioners to Congress for the year 1883, after stating the repairs to streets under contract, says:

"Under the existing law all improvements are made at the expense of the city at large without special assessment upon the abutting property, which is greatly enhanced in value by the improvements. The demand for such improvements being far in excess of the current revenues, an appropriation is made annually for the purchase of materials for 'permit work.' These materials are issued under certain restrictions to parties who will pay the cost of laying them. This amounts to a voluntary assessment, in which the District pays about two-thirds and the parties benefited one-third. It is evidently advantageous to the District to have as much work done on these terms as possible, and the system is acceptable to property owners as is shown by the fact that there is always a larger demand for these materials than the appropriation can meet. For the next year the estimates provide for increasing this appropriation and slightly diminishing the appropriation for improvements at the general expense. During the past year 11,434 feet of curb, 9,951 feet of flagging, 700 yards of cobble stones, 7,682 asphalt blocks, and 473,523 paving bricks were purchased from this appropriation at a cost of $12,788.02; and about two miles of streets were improved by them.

"The principal benefit derived from this appropriation is in laying new sidewalks and paving alleys. It often happens, however, that parties decline to contribute anything towards the cost of keeping the sidewalks and alleys adjacent to their property in proper condition. Under these circumstances the system becomes inoperative, and the sidewalks and alleys remain in very bad order. Especially is this the case in regard to the alleys, many of which are in

such a condition as to be injurious to health. Legislation is needed to empower the Commissioners, whenever an alley is declared by the health officer to be in such a condition as to constitute a nuisance, injurious to public health, to order it to be paved, the materials being purchased from the appropriation for permit work, and the cost of labor being assessed against the adjoining property, and collected as other taxes are collected."

Pages 23 and 24, Report of Engineer Department, 1883.

The report of the Commissioners to Congress for the year 1885, page 170, after stating the repairs to streets under contract, says:

"All other repairs of streets, avenues, and alleys are executed by day's labor, under the superintendent of streets, Mr. J. J. Burrows. This work includes the repairs of cobblestone pavements on streets and alleys, of macadam and gravel roadways (aggregating over 43 miles in length), the repairs of dangerous holes in sidewalks, and other miscellaneous work of that character, a detailed statement of which will be found in the appendix. The labor of the workhouse inmates is utilized in grading and filling up streets in the extreme eastern section of the city, and in cleaning unimproved streets and alleys.

"The 'permit work' in which the District pays for the materials and the property owners for the labor, is also executed by day's labor under the superintendent of streets. During the past year this work included 3½ miles of curb, gutters and sidewalks; 3,092 square yards of alleys paved with cobble, and 2,943 yards of asphalt blocks and 1,885 yards of granite blocks laid on streets, alleys and sidewalks, besides various culverts and bridges built on the 'Klingle road,' in the county. A more complete statement of this work will be found in the appendix."

Detail statement of this work will be found in the same report at page 271.

Acts of Congress which Legalized Whole and Half Cost Work.

The District appropriation act approved March 3, 1883 (22 Stat., top page 464), made the following provision, "for materials for permit work, thirty thousand dollars."

The act of July 5, 1884 (23 Stat., 125), increased this appropriation to $50,000; same amount act of February 25, 1885 (23 Stat., 313); $60,000 in act of July 9, 1886 (24 Stat., 132).

The act of March 3, 1887 (24 Stat., 573), making appropriations for the fiscal year ending June 30, 1888, contains this provision:

> "For materials for permit work, ninety thousand dollars; and the Commissioners of the District are authorized, in their discretion, to apply such material to and pay from this appropriation the cost of labor for the improvement and repair of alleys and sidewalks, when, in their opinion, such course is necessary for the public health, safety, or comfort: *Provided,* That the costs of such labor shall be charged against and become a lien on the abutting property, and its collection shall be enforced in the same manner as the collection of general taxes, and shall, when so collected, be credited to said appropriation."

See act of July 18, 1888 (25 Stat., 319), "For improvement and repair of alleys and sidewalks and the construction of sewers *under the permit system,*" $90,000; the act act of March 2, 1889 (25 Stat., 796), same title; act of August 6, 1890 (26 Stat., 296), under title "Permit work;" act of March 3, 1891 (26 Stat., 1065), same title; act of July 14, 1892 (27 Stat., 154), same title; act of March 3, 1893 (27 Stat., 541), same title; act of August 7, 1894 (28 Stat., 247), title, "Assessment and permit work;" act of March 2, 1895 (28 Stat., 748), same title; act of June 11, 1896 (29 Stat., 398), same title; act of March 3, 1897 (29

Stat., 669), same title; act of June 30, 1898 (30 Stat., 529), same title; act of March 3, 1899 (30 Stat., 1049), same title; act of June 6, 1900 (31 Stat., 559), same title; act of March 1, 1901 (31 Stat., 827), same title; act of July 1, 1902 (32 Stat., 596), title, "Improvements and repairs," subtitle, "Assessment and permit work;" act of March 3, 1903 (32 Stat., 961), same title and subtitle; act of April 27, 1904 (33 Stat., 368), same title and subtitle; act of March 3, 1905 (33 Stat., 891), same title and subtitle; act of June 27, 1906 (34 Stat., 490), same title and subtitle; act of March 2, 1907 (34 Stat., 1127), same title and subtitle; act of May 26, 1908 (35 Stat., 282), same title and subtitle; act of March 3, 1909 (35 Stat., 696), same title and subtitle; act of May 18, 1910 (36 Stat., 384), same title and subtitle; act of March 2, 1911 (36 Stat., 975), same title and subtitle; act of June 26, 1912 (acts of Congress affecting the District of Columbia, 1911, 1912, page 10), same title and subtitle; act of March 4, 1913 (acts of Congress affecting the District of Columbia, 1912-13, page 8), same title and subtitle.

Implied Power of Commissioners Resulting from Control Over Streets.

The Board of Public Works, under section 37 of the act of February 21, 1871 (16 Stat., 427, sec. 77, R. S. D. C.), and the Commissioners have *entire control* of the streets, avenues, and alleys. The statute says:

> "The Board of Public Works shall have entire control of and make all regulations which they shall deem necessary for keeping in repair the streets, avenues, alleys, and sewers of the city, and all other works which may be entrusted to their charge by the legislative assembly or Congress."

In view of this provision are public utility corporations and property owners to have an uncontrolled discretion as to the character of work done in repairing cuts in streets made

for their benefit, even had Congress not recognized the permit system? Is it not necessarily implied that the District shall do this work at the expense of the property owner, and that the District may by agreement or on default do the work and charge him with the cost of the work?

See District *vs.* Railroad Co., 4 Mackey, 214, 217, 223.

The citizen cannot create an obstruction or defect in the streets for any purpose without the consent of the District, and in giving a permit to cut the streets the District has a right to protect itself.

The District is liable for defects and obstructions in the streets.

Assignment of Errors.

First. The court erred in holding and deciding that the original declaration of the plaintiff and as amended did not state facts sufficient to constitute a cause of action against the defendants.

Second. The court erred in holding and deciding that there is no law nor any rule or regulation pleaded under which the defendant Petty and his sureties were chargeable with the custody of or otherwise accountable for any of the moneys in said original declaration and the amendments thereto mentioned.

Third. The court erred in holding and deciding that the action was founded on failure to observe the rules and regulations from time to time prescribed for the government of the civil service of the District of Columbia, and that it was necessary to plead such rules and regulations, and in failing to hold that said Petty was liable for not accounting for all moneys that came into his possession or that the purpose of the bond was to hold him for all public moneys received by him.

Fourth. The court erred in holding and deciding that the condition of the bond in suit did not cover breaches under laws and regulations enacted and in force subsequent to the execution of the bond.

Fifth. The court erred in holding and deciding that the moneys which came into the hands of said Petty could not be disbursed except by congressional appropriation.

Sixth. The court erred in not holding and deciding that the bond in suit was good although not a statutory bond, and that the principal and sureties were estopped to deny its validity.

Seventh. The court erred in sustaining the demurrers of the defendants to the original declaration and the amendments thereto and in rendering judgment for the defendants.

ARGUMENT.

Statutory Authority for the Bond.

The existence of such authority was denied by several trial justices, excepting Justice Wright, and this view, it is understood, was sustained by the Court of Appeals.

It may be noted that the auditor has, as the successor of the comptroller, the duty of receiving and filing in his office a transcript of all assessments of taxes, and the duty of preparing an aggregate of the amount of taxes levied, and of comparing the same with the assessment lists and the tax books of the collector of taxes, and the duty of filing and recording all reports of tax sales as provided in section 11 of the act of the Legislative Assembly of August 23, 1871 (R., 7, 8).

Under section 10 of that act it was the duty of the auditor, as such, to keep a record of all bills certified by him, their

amounts, the appropriation to which they are chargeable, and the date of approval; to certify and audit all accounts and certify the same to the comptroller. The offices of auditor and comptroller were consolidated August 11, 1876 (R., 9). From July 1, 1878, to June 30, 1898, so it is alleged in the declaration (R., 10), and admitted by the demurrers, the auditor was and continued to be the officer in charge of the disbursements of money, except as to the duty of paying laborers and employees.

These duties were a part of the office of the auditor when Mr. Petty entered that office, and were, therefore, contemplated when the bond was given, and all the duties subsequently imposed were allied to them.

The Bond is a Good Statutory Bond in Form and in Law.

The late Legislative Assembly, by its act approved August 23, 1871, required the auditor to give bond "in the sum of twenty thousand dollars, conditioned for the faithful discharge of the duties of his office." (See recitals of amendment to declaration, R., bottom of page 9, and top of page 10.) This is a general direction to give the bond, and there are no negative words in the act to make it void if given in any other form. One of the conditions of the bond substantially complies with this statutory provision. It says, "the condition of said obligation is such that if the said James T. Petty shall faithfully and efficiently perform all the duties of his said office as provided by law," then said obligation to be void.

U. S. *vs.* Bradley, 10 Peters, 343, 358.
U. S. *vs.* Linn., 15 Peters, 290, 316.

If the superadded words are illegal they will be rejected.
Omaha Hotel Co. *vs.* Kountz, 107 U. S., 378, 381, 395, 396.
U. S. *vs.* Hodson, 10 Wall., 395, 408.
U. S. *vs.* Mora, 97 U. S., 413, 422.

The Provisions of Law at the Date of the Bond, May 1, 1888.

The *powers* of the District of Columbia are of the widest scope concerning the duties of the auditor.

The act of February 21, 1871, 16 Stat., 419 (referred to in amendment to declaration, R., bottom page 7), by section 1 thereof, declares:

> "That all that part of the territory of the United States included within the limits of the District of Columbia be, and the same is hereby, created into a government by the name of the District of Columbia, by which name it is hereby constituted a body corporate for municipal purposes, and may contract and be contracted with, sue and be sued, plead and be impleaded, have a seal, and exercise all other powers of a municipal corporation not inconsistent with the Constitution and laws of the United States and the provisions of this act."

The act of June 20, 1874, 18 Stat., 116 (referred to in amendment to declaration, R., 9), provides as stated in the amendment to the declaration for the continuance of this government temporarily by three Commissioners, and continues:

> "and said Commissioners are hereby authorized to abolish any office, to consolidate two or more offices, reduce the number of employees, remove from office, and make appointments to any office authorized by law."

The "Act providing a permanent form of government for the District of Columbia," approved June 11, 1878, 20 Stat., 102 (referred to in amendment to declaration, R., p. 9), provides in section 1:

> "That all the territory which was ceded by the State of Maryland to the Congress of the United States for the permanent seat of the Government of the United States shall continue to be designated as

> the District of Columbia. Said District and the property and persons that may be therein shall be subject to the following provisions for the government of the same, and also to any existing laws applicable thereto not hereby repealed or inconsistent with the provisions of this act. The District of Columbia shall remain and continue a municipal corporation, as provided by section two of the Revised Statutes relating to said District, and the Commissioners herein provided for shall be deemed and taken as officers of such corporation; and all laws now in force relating to the District of Columbia not inconsistent with the provisions of this act shall remain in full force and effect."

Section 2 provides, among other provisions:

> "And the Commissioners of the District of Columbia shall have power, subject to the limitations and provisions herein contained, to apply taxes or other revenues of said District to the payment of the current expenses thereof, to the support of the public schools, the fire department, and the police, and for that purpose shall take possession of all the offices, books, papers, records, moneys, credits, securities, assets and accounts belonging or appertaining to the business or interests of the government of the District of Columbia, and exercise the duties, powers, and authority aforesaid; but said Commissioners, in the exercise of such duties, powers and authority, shall make no contract or incur any obligation other than such contracts and obligations as are hereinafter provided for and shall be approved by Congress. * * *
>
> "And said Commissioners are hereby authorized to abolish any office, to consolidate two or more offices, reduce the number of employees, remove from office and make appointments to any office under them authorized by law."

Section 4 of the act mentions the auditor, but only in connection with disbursements of taxes and appropriations to be made by Congress, it says:

> "All taxes collected shall be paid into the Treasury of the United States, and the same, as well as the

> appropriations to be made by Congress as aforesaid, shall be disbursed for the expenses of said District, on itemized vouchers, which shall have been audited and approved by the auditor of the District of Columbia, certified by said Commissioners, or a majority of them; and the accounts of said Commissioners, and the tax collectors, and all other officers required to account, shall be settled and adjusted by the accounting officers of the Treasury Department of the United States."

Section 5 of this act deals (here condensed and briefed) with the repair of streets, avenues, alleys, or sewers in substituting or the laying of new pavements, and says (still condensed) that advertisement for proposals to do the work shall be had if the cost exceeds one thousand dollars, "and the lowest responsible proposal for the kind and character of pavement or other work which the Commissioners shall determine upon shall in all cases be accepted." The contracts must be entered into with particular form, under the act, which form is of the essence of the thing to be done.

District of Columbia *vs.* Bailey, 171 U. S., 161.

Section 5 continues:

> "The cost of laying down said pavement, sewers and other works, or of repairing the same, shall be paid for in the following proportions and manner, to wit: When any street or avenue through which a street railway runs shall be paved, such railway company shall bear all the expense for that portion of the work lying between the exterior rails of the tracks of such roads, and for a distance of two feet from and exterior to such track or tracks on each side thereof, and of keeping the same in repair. * * *
>
> "It shall be the duty of the Commissioners of the District of Columbia to see that all water and gas mains, service pipes, and sewer connections, are laid upon any street or avenue proposed to be paved or otherwise improved before any such pavement or other permanent works are put down; and the Washington Gas Light Company, under the direction of

> said Commissioners, shall at its own expense, take up, lay, and replace all gas mains on any street or avenue to be paved at such time and place as said Commissioners shall direct."

It is manifest, it is thought, that this act does not provide for particular contract for the innumerable minor repairs to streets occasioned by excavations therein, in order to connect houses with water, gas, electric current, or sewers. And such has been the uniform construction of the officials working under the act, and so recognized by Congress subsequent to the act of June 11, 1878, and to the act now quoted.

Section 2 of the District appropriation act approved March 3, 1881 (21 Stat., 466), states:

> "SECTION 2. That all moneys appropriated by this act, together with all revenues of the District of Columbia, from taxes or otherwise, shall be deposited in the Treasury of the United States as required by the provisions of section 4 of an act approved June eleventh, eighteen hundred and seventy-eight, and shall be drawn therefrom only on requisition of the Commissioners of the District of Columbia (except that the moneys appropriated for interest and the sinking fund shall be drawn therefrom only on the requisition of the Treasurer of the United States), such requisition specifying the appropriation upon which the same is drawn; and in no case shall such appropriation be exceeded either in requisition or expenditure; and the accounts for all disbursements of the Commissioners of said District shall be made monthly to the accounting officers of the Treasury by the auditor of the District of Columbia on vouchers certified by the Commissioners, as now required by law."

The Bond, Properly Construed, Covers the Breaches Assigned.

In disbursements of the appropriations made by Congress the auditor was required to follow the act of 1881, but in the receipt from citizens and reimbursement of appropriations

for permit work he was governed by the practice and orders regulating the service, as recognized by Congress under the permit system.

At the time the bond in suit was given, therefore, the statutes provided for entire control over streets by the Commissioners, a municipal government with statutory powers, and also "all other powers of a municipal corporation not inconsistent with the Constitution and laws of the United States" and the provisions of the statutes creating it.

Authority to abolish and consolidate offices, with supervision over all officers and employees, existed.

Provision for auditing of all disbursements of all the revenues of the District, from taxes or otherwise, by the auditor on itemized vouchers approved by him and certified by the Commissioners existed.

No prohibition against the deposit by citizens of their own money to pay for excavations in streets for gas, water, and other like services existed.

A recognition of this system by act of Congress existed.

The defendants in error were bound to know these statutes, powers, and conditions, and contracted with regard to them when Mr. Petty accepted the office of auditor and the bond was given.

Indeed, the provisions of law are a part of the bond.

U. S. *vs.* Hawkins, 10 Peters, 125, 133.

Whiteside *vs.* United States, 93 U. S., 247.

As the breaches assigned were occasioned by non-performance of duties set forth in an order made after May 1, 1888, consideration is given whether these duties cannot be presumed to have entered into the contemplation of the parties at the time the bond was executed, particularly as it is apparent that such duties had previously existed. The Court of Appeals would not entertain a presumption that such after-imposed duties were contemplated by the bond, on the authority of Gaussen *vs.* United States, 97 U. S., 584;

2 Brandt, S. & G., sec. 660. (See opinion, R., bottom of page 35.) This is assigned as error. (See fourth assignment of error, R., 38, and this brief.)

First. The Court of Appeals ignored the statutes recognizing the permit system, the implied powers given under the entire control over streets, the statutory power of the Commissioners to abolish any office, to consolidate two or more offices, reduce the number of employees, remove from office, and the wording of the bond. Clearly Congress had power to delegate this authority, and hence the probability was in law contemplated that the Commissioners would in abolishing offices and consolidating them with other offices impose additional duties on the auditor.

Parties to official bonds contract with reference to the acknowledged power of the legislature to vary and change the power and duties of the officer.

Supervisors *vs.* Clark, 92 N. Y., 391, 395.

The Court of Appeals has held that the District has the following powers:

> "First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the declared objects and purposes of the corporation."
>
> Daly *vs.* Macfarland, 28 App. D. C., 558.

Second. The parties so contracted in the bond.

To the condition of the bond, stated in the law creating the office of auditor (section 10, act of Legislative Assembly, August 23, 1871, R., 7 and 8), additional conditions were added, viz:

> (*a*) Performance of "the rules and regulations *from time to time* duly prescribed for the government of the civil service of said District;"
>
> (*b*) To "well and truly *pay over, disburse,* and *account* for all *moneys* that shall come to his hands, as the law and orders governing said service shall require."

Where a bond was given simply with conditions to well and truly execute the duties of cashier of a bank whose by-laws provided that he shall "do and perform all other duties as may from time to time be required of him by the president or board of directors relative to the affairs of the institution," and it appeared that on the appointment of the cashier he was required to perform the duties of that office and of teller of the bank also, it was held that—

> "The bond of the cashier must be construed to cover all defaults in duty, which are annexed to the office from time to time, by those who are authorized to control the affairs of the bank; and the sureties are presumed to enter into the contract, with reference to the rights and authorities of the president and directors under the charter and by-laws."
>
> Minor *vs.* The Merchants, &c., Bank, 1 Peters, 46, 72, 73.

If this be true of the charter of a private corporation, it must be equally true of a charter of a public corporation.

In United States *vs.* Powell it was said:

> "Suppose that it is so, still it is contended by the defendants that they are not bound by the first bond to reimburse the plaintiffs for the amount paid to the storekeeper for that service, because the bond was made and executed before the passage of the joint resolution.
>
> "It must be admitted that any substantial addition by law to the duties of the obligor of a bond after the execution of the instrument, materially enlarging his liabilities, will not impose any additional responsibility upon his sureties, unless the words of the bond, by a fair and reasonable construction, bring such subsequently imposed duties within its provisions." (Citing authority.) "Conceding that rule to be correct, it becomes necessary to examine the recitals and condition of the bond first described in the declaration, as the question must depend very largely upon the construction of the language there employed. By the recital of the bond it appears that the principals

therein named intended, on and after that date, to be engaged in the business of distillers within the fifth collection district of the State, and the condition of the bond is that they shall in all respects faithfully comply with all the provisions of law in relation to the duties and business of distillers, and that they shall pay all penalties incurred or fines imposed on them for a violation of any of the said provisions. Stronger language to signify an intention to stipulate that the principals in the bond should comply with duties subsequently imposed by law in relation to the business of a distiller could not well be employed, as the language of the bond is that they shall faithfully comply with all the provisions of law in relation to the duties and business of distillers, knowing, as all the obligors did, that Congress might at any time enact new provisions imposing new duties or vary those already imposed." (Citing authorities.) "Both parties, it must be assumed, knew that changes might be made in that behalf at any time, and the defendants must have understood that it never could have been intended that a new bond should be required with every modification made in relation to the duties and business in which the principals in the bond were about to engage. Where a person was elected sheriff and executed a bond to the county, conditioned that he would well and faithfully in all things discharge the duties of the office during his continuance in the same by virtue of his said election, the Supreme Court of Ohio held that the language of the bond was broad enough, not only to embrace any duty imposed at the date of the bond, but any also that might be imposed upon the officer by law during the term for which the bond was given." (Citing authorities.) "Bonds in such cases, as well as in cases like the one before the court are required to secure the faithful discharge of the duties ordinarily imposed upon the principal obligor, without reference to the time when the law was passed imposing the duty; and where, as in this case, the language of the bond is sufficiently comprehensive to embrace duties subsequently imposed, of a character corresponding with those required at the date of the bond, the construction which gives a prospective as well as

> a retrospective operation to the condition of the bond may well be adopted as both reasonable and just to all concerned."
>
> United States *vs.* Powell *et al.*, 14 Wall., 493, 501, 502.

The Court of Appeals does not notice the words of the condition of the bond, nor refer to the general powers of the Commissioners to prescribe the duties of officers of this District.

Gaussen *vs.* United States is not an authority in favor of the court's position, and is clearly distinguishable from the case at bar. In the Gaussen case it is said:

> "This suit was founded upon the bond of a collector of customs, the condition of which is that he had truly executed and discharged and should continue to execute and discharge all the duties of the office of collector according to law; and the breach assigned was that he had failed to account for and pay over the money received by him in his official capacity as collector. The defendant's testator was a surety on the bond; but that is an immaterial fact in the case, for nothing is plainer than the rule that a surety in a bond is liable to the same extent to which his principal is liable by force of the bond."
>
> Gaussen *vs.* United States, 97 U. S., 590.

There were no words in this condition, it will be seen, contemplating any after-imposed duties. It was alleged by plea that subsequent to the execution of the bond the Government imposed additional duties upon the collector. The court observed that the plea did not allege that the additional duties changed the character of the office, or that it increased the responsibility of the collector for money received by him as collector of customs.

"If it be conceded," says the court, "as it may be, that the additional duties, different in their nature from those which belonged to the office when the official bond was given, will not impose upon the obligor in the bond, as such, additional

responsibilities, it is undoubtedly true that such a condition or new duties does not render void the bond of the officer as a security for the performance of the duties at first assumed."

Gaussen *vs.* United States, 97 U. S., 584, 590.

Duties Imposed on the Auditor Subsequent to the Date of the Bond.

First is the order of June 13, 1888 (R., 16).

This imposed duties on the auditor concerning permit work, but no doubt these duties had been previously performed. That this is true witness the acts of Congress and the reports of the Commissioners. The auditor was to receive a duplicate of the deposit made (by citizens) with the collector of taxes, who was to pay out the moneys to the auditor upon requisition of the auditor approved by the Commissioners. The vouchers for services rendered (by employees) or material furnished, payable from the permit fund, were to be forwarded to the auditor for *audit and payment* by this requisition on the collector of taxes, and the auditor was to receive credit and account. The pay clerk of the auditor's office, however, was to receive money (cash) and pay employees according to pay-rolls. The auditor was also to pay the balance due each depositor after the work was done upon presentation of the original certificate of deposit. In other words, the auditor was to charge himself with the moneys received and credit himself with the moneys expended under the permit system.

All this time there was no disbursing officer. This pay clerk (mentioned in paragraph four of the order) was subsequently recognized and described as disbursement clerk. His duty was to pay laborers and employees under the permit system. The act of March 3, 1891 (26 Stat., 1064), provides for a disbursing clerk to pay laborers and employees. Nothing is said about materials nor about deposits or their return.

The other duties imposed on the auditor were not disturbed by this act.

The act of August 7, 1894 (28 Stat., 247, 248), provided that, as alleged in the declaration—

> "property owners who requested improvements under the permit system shall deposit in advance with the collector of taxes of the District of Columbia an amount equal to one-half of the estimated cost of such improvements; that all money received by the Collector of Taxes for the District of Columbia for work done upon the request of property owners shall be deposited by him in the United States Treasury to the credit of the Permit Fund; that upon completion of work done at the request of property owners, the Commissioners shall repay to the then current appropriation for assessment and permit work out of the Permit Fund, a sum equivalent to one-half of the cost of the work, and shall return to the depositors, from the same fund, as application may be made therefor, any surplus that may remain over and above one-half of the cost of the work; that the said repayment to the appropriation for assessment and permit work and the said return to the depositors from the said Permit Fund above mentioned were duties which were required of the said Auditor. That the said work was actually known as 'half-cost work.' "

This statute, says the Court of Appeals (R., 35) was authority for half-cost and not whole-cost work.

When the Commissioners needed money to do work under the permit system the Treasurer of the United States advanced it (R., 11), and it became the duty of the Auditor to see that the appropriation used was reimbursed. The method of return as to half-cost work is described in the declaration (R., 12).

Subsequently, as the declaration alleges (R., 10), February 6, 1897, the Commissioners made another order relating to convenience in keeping these accounts requiring a general account to be opened styled "Deposit and Assessment Fund" (whole cost work). All materials and labor were to be

charged against this account and paid by the deposits. Congress having recognized the permit system no objection can be made to this method of bookkeeping.

Where the whole cost was deposited by the property owner it is apparent that there was no need to receive an advance from the United States, but where one-half of the cost only was paid by the property owner the United States advanced the whole and received back the one-half so paid. This money, says the first breach assigned (R., 13), was received by the Auditor from the disbursing officer (created by act of June 30, 1898; 30 Stat., 526; R., 11) and should have been paid to the Treasurer of the United States to the credit of the appropriation "Improvements and Repairs," but he did not do so, whereby $23,007.49 was lost.

The whole-cost work embraced in the general account "Deposit and Assessment Fund," and the subject of the assignment of the last four breaches in the declaration (which the Auditor received from the disbursing officer as the successor of the Collector of Taxes, in that regard), was not reimbursed by the Auditor and $21,674. 38, $18,230.98, and $12,571.65 thereof was lost.

The Court of Appeals, in effect, considers the order of June 13, 1888 (R., 16) a rule or regulation within the meaning of the bond.

The court says:

> "It is so apparent, we think, as to render discussion unnecessary that down to the promulgation of said order of June 13, 1888, there was no law. rule or regulation making the Auditor of the District custodian or accountable for public moneys.
>
> "It is insisted by the appellees that the whole-cost work, to which the 'permit work' deposit mentioned in this order was devoted, was entirely unauthorized by law and hence that the order is not material here. We can find no statute authorizing the District to *receive or expend* such permit work deposits. On the contrary, the Commissioners were prohibited from contracting for improvement of streets, etc., except

> in pursuance of appropriations made by law. * * * The order, therefore, has no place in this inquiry as the moneys received from citizens for street improvements were not public moneys in any legal sense."

Again the court says:

> "There was no law making it the duty of the Auditor to have the custody of or to disburse any of these moneys, nor does the declaration, as we have found, set out any prescribed rule, order, or regulation imposing said duties, or either of them, upon the Auditor."
>
> Record, p. 36.

First, there were statutes authorizing the receipt and expenditure of permit work deposits as hereinbefore shown.

Second, the order of June 13, 1888, which is pleaded, being based on statutory authority, and being conceded to have been pleaded, fixes liability on the Auditor and the other defendants in error, even if regulations were necessary to be pleaded in addition to pleading the condition of the bond to perform all the duties of the office.

But if there were failure to plead the rules and regulations, nevertheless the demurrers should have been overruled. The same objection was made by plea in Howgate's case. The law when applied to a plea is no different when it is applied to a demurrer. In Howgate's case the third plea, that there was no such office created by law as was mentioned in the bond, and *"no duties pertaining to the office prescribed by law or by any regulation or order of any department or officer,"* was overruled.

The court said:

> "If all the duties of such officer were not clearly specified and defined by law or the regulations of the department in which he was serving, it was at least clearly apparent that the public moneys which he received he was bound to honestly disburse and to account for to the proper officers of the Government. As a security for the honest discharge of such duties

the bond in question was given, and one of the conditions of the bond was that he should 'faithfully expend all public moneys and honestly account for the same, and for all public property which shall or may come into his hands on account of the signal service of the United States Army without fraud or delay.' When he was guilty of the forgery of vouchers and the embezzling of the public moneys received by him as said officer, there can be no doubt or uncertainty that such conduct was a plain violation of his duty as an officer, and that the condition of the bond certainly and plainly covered such conduct and was violated thereby."

(Moses *vs.* United States, 166 U. S., 571, 575, 588.)

In Howard *vs.* United States (184 U. S., 676) there was a judgment against the surety upon the bond of a clerk of a circuit court of the United States conditioned "faithfully to discharge the duties of his office and seasonably to record the decrees, judgments, and determinations of the court" (p. 682). The defendant, Henry County, made a tender which the clerk took and deposited in his own private account, and a judgment was rendered upon the suit of this defendant for the amount so tendered. On page 683 the court said:

"But it is suggested that in the absence of a statute distinctly so providing, the clerk was not entitled to receive the money deposited in payment and satisfaction of Stewart's claim. It is true that no statute declares in words that a clerk may receive money brought into court for the purposes of a pending suit. But it is clear that Henry County was entitled to bring into court and tender to its adversary the amount it was willing to pay in satisfaction of his claim. It cannot be that it was the duty of the judge of the court himself to have received the money and personally deposited it as required by law."

The Obligation is Good as a Voluntary Bond.

If there is no requirement of the Auditor to give bond for handling money the bond is a good common-law bond for that purpose.

> "If a person occupying official position voluntarily gives a bond providing against loss by reason of his acts as to matters concerning which there is no statutory provision, such bond, although not a statutory bond, is, if founded on a sufficient consideration, and is not prohibited by statute nor contrary to public policy, valid and binding on the principal and his surety as a voluntary common-law obligation."
>
> Brandt S. & G., sections 618 and 621.
> Tyler *vs.* Hand, 7 How., 573.
> U. S. *vs.* Pumphrey, 11 App. D. C., 44.
> D. C. *vs.* Ball, 22 App. D. C., 543, 553.

The principal and sureties on the bond are estopped to deny its validity in whole or in part because the principal has enjoyed the benefits arising from the giving of the bond.

U. S. *vs.* Hodson, 10 Wall., 409.
Daniels *vs.* Tearney, 102 U. S., 420.
Grady *vs.* U. S., 98 Fed. Rep., 238.
Jessup *vs.* U. S., 106 U. S., 147.

The demurrer admits that the bond was taken with authority and that it was given for a consideration.

Tyler *vs.* Hand, 7 How., 573, 583.

Pleading.

No objection was taken to the *form* of the declarations; however, a few authorities will be cited.

The original declaration was sufficient in form, and so were the amendments.

The form used is based on 1 Archibald's *Nisi Prius*, 307; surplusage is not a subject of demurrer, Stephen on Plead-

ing (Tyler), 364, 365; if any breach be good, the demurrer must be overruled. Each breach assigned stands in the place of a count in the declaration. People *vs.* Gregory, 11 Ill. App., 370; Ordinary *vs.* Barnes, 67 N. J. L., 80. Breach assigned in the terms of the condition is good on demurrer.

Berger *vs.* Williams, 4 McLean (U. S.), 577, 580.

U. S. *vs.* Spalding, 2 Mason (U. S.), 478 (5 Cyc., 827).

3 Ency. Pl. and Pr., 656, and notes.

A general mode of pleading is allowed where great prolixity is thereby avoided.

Stephen on Pleading (Tyler), 318, 319, 320.

For these reasons the court is asked to reverse the judgment of the Court of Appeals of the District of Columbia.

Respectfully submitted,

EDWARD H. THOMAS,
Corporation Counsel, D. C.,
Attorney for Plaintiff in Error.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1913.

No. 316.

DISTRICT OF COLUMBIA, *Plaintiff in Error,*

vs.

JAMES T. PETTY, ET AL., *Defendants in Error.*

BRIEF FOR DEFENDANTS IN ERROR, CHARLES W. CHURCH, et al., EXECUTORS, AND GEORGE T. DEERING.

STATEMENT.

This case comes to this court upon a writ of error from the judgment of the Court of Appeals of the District of Columbia, affirming a judgment of the Supreme Court of the District of Columbia, sustaining a demurrer to the declaration of the plaintiff in error in an action upon the official bond of James T. Petty as Auditor of the District.

Demurrers to the original, the first amended and the second amended declarations were successively sustained, the final judgment being accompanied by denial of a motion further to amend, which denial, also, is assigned as error.

The original declaration, filed November 9, 1903, alleged that Petty, as principal, and Church, Wilson and Deering, as sureties, executed a bond on the 1st day of May, 1888, in the sum of $20,000, subject to the following condition thereunder written:

> "Whereas, the above bounden James T. Petty has been appointed to the office of Auditor in and for the District of Columbia,
>
> "NOW, THEREFORE, THE CONDITION OF SAID OBLIGATION IS SUCH, That, if said James T. Petty shall faithfully and efficiently perform all the duties of his office, as provided for by law and the rules and regulations from time to time duly prescribed for the government of the Civil Service of said District, and shall well and truly pay over, disburse and account for all moneys that shall come into his hands as the law and orders governing said service shall require, then said obligation to be void, otherwise to remain in full force."

The declaration averred that Petty had failed to perform all the duties of his office as provided by law, and to observe said rules and regulations, and to pay over, disburse and account for all moneys that came into his hands as the law and orders governing his duties required, in five particulars, namely:

First. That he failed to account for moneys of the District represented by ten checks, of varying amounts and dates, drawn by Charles C. Rogers, Disbursing Officer, or his deputy, countersigned by Petty as Auditor, or by the Acting Auditor, on the Treasurer of the United States,

charged to the "Permit Fund, District of Columbia," which checks should have been deposited by Petty, as Auditor, in accordance with the law and the rules governing the conduct of his office, with the Treasury of the United States, to the credit of the appropriation for "Improvements and Repairs, District of Columbia, Assessment and Permit Work"; that the said checks were not so deposited, but were endorsed by Petty, as Auditor, afterwards cashed at the Central National Bank of Washington, and their proceeds never accounted for to the District, or deposited in the Bank, or at the Treasury, to its credit.

Secondly. That Petty failed to account for moneys of the District represented by fifteen checks, of varying specified dates and amounts, drawn by the Disbursing Officer, or his deputy, and countersigned by Petty as aforesaid, or by the Acting Auditor, on the Treasurer of the United States, to the order of James T. Petty, Auditor, charged to various appropriations for the District of Columbia, and endorsed by Petty as Auditor, which checks should, "in accordance with the law and rules and regulations aforesaid," have been deposited in the Traders' National Bank, of Washington, D. C., as reimbursements of the "Deposit and Assessment Fund"; that they were not so deposited, but, after being endorsed by the said Auditor, were cashed at the Central National Bank, and their proceeds never in any manner paid or accounted for to the plaintiff.

Thirdly. That Petty, as Auditor, failed to account for moneys of the District represented by nine checks, of varying specified dates and amounts, to the order of James T. Petty, as Auditor, upon the Central National Bank, charged to the account of the said Auditor in said Bank, and intended for deposit in the Traders' National Bank, to reimburse the Deposit and Assessment Fund, where said fund was kept; that the said checks were endorsed by Petty, as

Auditor, and were not so deposited, but were cashed at the Central National Bank, of Washington, D. C., and their proceeds never paid or accounted for to the plaintiff.

Fourthly. That Petty, as Auditor, failed to account for moneys of the District represented by six checks, of varying specified amounts and dates, drawn by himself as Auditor, three of them upon the Central National Bank and three of them upon the National Capital Bank, all payable to his order as Auditor; that these checks should have been deposited at the said banks to his credit as Auditor, and were not so deposited, but, having been endorsed by him as Auditor, were cashed at the Central National Bank, and the proceeds never paid or accounted for to the plaintiff.

Fifth. That the defendant Petty, as Auditor, failed to account for moneys of the District of Columbia represented by two checks, of specified dates and amounts, drawn by himself as Auditor upon the Central National Bank, and payable to his order as "Disbursing Agent, Rock Creek Park, D. C."; that these checks, or their proceeds, were not used by him in his capacity as such Disbursing Agent, were drawn without authority of law, and the proceeds never repaid or accounted for to the plaintiff.

It will be noted that, in the first breach assigned, the allegation is that the checks therein referred to "should have been deposited by the said defendant, James T. Petty, as Auditor, as aforesaid, *in accordance with law and the rules governing the conduct of his office*, with the Treasurer of the United States," etc.; that, in the second breach assigned, the allegation is that the checks "should, *in accordance with law and the rules and regulations aforesaid*, have been deposited in the Traders' National Bank, of Washington, D. C., as reimbursements of the Deposit and Assessment Fund;" that, in the third breach assigned, the

only allegation is that the checks mentioned *"were intended for deposit in the Traders' National Bank, of Washington, D. C.,* to reimburse the Deposit and Assessment Fund," without the allegation that there was any law, rule or regulation requiring or providing for such deposit; that, in the fourth breach assigned, the allegation is that the checks *"should have been deposited at the said banks* to the credit of said Petty, as Auditor, as aforesaid," in like manner without the allegation of any law or prescribed rule or regulation requiring or providing for such deposit; while the fifth breach assigned alleges that Petty drew checks as Auditor upon the Central National Bank to his order as Disbursing Agent of Rock Creek Park, D. C., without authority of law, and used the proceeds thereof in his capacity as such Disbursing Agent, without averring the existence of any law or prescribed rule or regulation under which he was chargeable as Auditor, or in any capacity, with the custody of the funds in the Central National Bank referred to, as Disbursing Agent of Rock Creek or otherwise.

The sureties demurred to this, the original declaration, assigning as the points of law to be argued in support of the demurrer that there was no law, nor any rule or regulation pleaded, under which the defendant Petty was chargeable with the custody of, or otherwise accountable for, any of the moneys in the declaration mentioned. At the argument of the demurrer, which was sustained by the Court, it was not contended on behalf of the plaintiff that there was any law charging the Auditor with the custody of any moneys, or making him accountable therefor, but it was insisted that there was no necessity for pleading the rules, regulations or practice of the office under which it was claimed he became their custodian and so accountable, which contention was overruled and the demurrer sustained.

In the first amended declaration, filed pursuant to leave obtained, the alleged breaches were copied, *verbatim,* from the original declaration, but were preceded by a voluminous history of the office of Auditor of the District of Columbia, with a summary of the statutes, rules and regulations from time to time enacted or prescribed, down to the institution of the suit, no one of which statutes, rules or regulations, as the surety defendants contended below, and now contend, devolved upon the Auditor the duty of being the custodian of, or accountable for, any moneys whatsoever.

The statutes, briefly summarized, were:

1. The Act of July 7, 1870, authorizing, not the District of Columbia, but the Mayor and Aldermen of the City of Washington, to appoint an Auditor and a Comptroller, the duty of the former being to audit and certify to the Comptroller all accounts against that corporation, and to retain the originals of all contracts made and orders given for work or improvements by it, while the duties of the Comptroller were to keep an account of all warrants, of all taxes levied, of all receipts for taxes given by the Collector and Register, etc., to draw warrants for the payment of accounts against the corporation, countersigned by the Mayor, all moneys, from any and all sources, to be deposited, not by the Comptroller or the Auditor, but by the Collector and Register, to the credit of the city in a designated depositary.

2. The Act of February 21, 1871, creating the District of Columbia a body corporate for municipal purposes, with power in its legislature to provide for the election or appointment of municipal officers, this act repealing the charter of the City of Washington and abolishing all offices of that corporation after June 1, 1871.

3. The Act of the Legislative Assembly of August 23, 1871, making it the duty of the Auditor to audit all accounts

against the District, to keep a record of all bills certified by him and the appropriations to which they were chargeable, to certify to the Comptroller all accounts audited by him, and to countersign all warrants drawn by the Comptroller, if found by him correct; while, under this act, the duty of the Comptroller was to keep an accurate account of all appropriations made by the legislative assembly and of all evidences of indebtedness issued by the District, to keep in his office a transcript of all assessments of taxes, to charge to the respective appropriations all payments made upon the certificate of the Auditor, and to draw warrants upon the Treasurer therefor, provided there should be a balance to the credit of the particular appropriation for the payment thereof, etc.—neither of these officers being charged with the custody of money or accountable therefor.

4. The Act of Congress of June 20, 1874, abolishing the then existing form of government and establishing the present form, by Commissioners, who were authorized to abolish and consolidate offices and make appointments thereto, followed by an allegation that the Commissioners, on August 11, 1876, consolidated the offices of Auditor, Comptroller, and Deputy Comptroller into that of Auditor, modified by their later order of August 19, 1876, which directed the Auditor to perform the duties of Auditor and Comptroller.

5. The Act of Congress of June 11, 1878, continuing the government by Commissioners, providing that all *taxes* should be paid into the treasury of the United States, and that appropriations should be disbursed on itemized vouchers, audited and approved by the Auditor, and certified by the Commissioners or a majority of them.

6. The Act of Congress of March 3, 1881, providing that all accounts of disbursements shall be made to the account-

ing office of the Treasurer by the Auditor, on vouchers certified by the Commissioners, as required by law, with a like provision in the Act of Congress, approved July 1, 1882, followed by an order of the Commissioners on December 8, 1882, abolishing the office of Comptroller and imposing the duties of that office on the Auditor.

Up to this point, it is clear that there was no law, rule or regulation making the Auditor of the District the custodian of moneys or accountable therefor.

The declaration then alleges that, following the last statute and the said order of the Commissioners of December 8, 1882, those officers, on the 13th day of June, 1888, passed an order, which is made an exhibit to the declaration (Record, p. 17), containing seven sections, of the following purport: A first section, requiring the Collector of Taxes, on receiving a deposit for "Permit Work," etc., to give receipts therefor in duplicate, one of which should be transmitted to the Auditor, and that *the Collector* should pay out no moneys thus received except upon the requisition of the Auditor, approved by the Commissioners; a second section, requiring the superintendents of streets and of sewers, respectively, to prepare duplicate payrolls for labor and materials, payable from the Permit Fund, which, after approval by the Commissioners, should be forwarded to the Auditor for audit and payment; a third section, requiring the Auditor, after receiving such payroll or other voucher, to examine, approve, if correct, and make requisition upon the Collector of Taxes for payment of the amount thereof; a fourth provision requiring "the pay clerk of the Auditor's office" to take the rolls thus prepared, with the money necessary to meet the same, to the place where the work was being done, and to pay in cash to each claimant the amount found to be due, this pay clerk being required to give bond with approved surety for the faithful perform-

ance of the duties required of him; a fifth paragraph requiring the Auditor to open an account with the Collector of Taxes, debiting him with all deposits on account of permit work and crediting him with the requisitions of the Auditor honored by the Collector; a sixth section requiring the Auditor to debit himself with the moneys received from the Collector of Taxes upon the requisitions made as above provided in section 1, and to credit himself with payments upon vouchers duly certified and approved as provided in sections 2 and 7, and a seventh section, providing that, after the work covered by a deposit had been completed and paid for, the Auditor should state an account with the depositor, make requisition for any balance appearing in his favor, and repay the same upon presentation of the original certificate of deposit, the receipt of the depositor upon this original certificate for the amount thus repaid to be the Auditor's voucher therefor.

The declaration does not, in terms, state what constituted the "Permit Work" or the "Permit Fund" referred to in this order of June 13, 1888; but it sufficiently appears from it (Record, pp. 10-11) that Permit Work was that made necessary as the result of cuts made in streets, avenues, roads and alleys, to be paid for by private deposits, called "whole-cost work," because its entire cost was defrayed from deposits voluntarily made by property owners. These deposits were referred to in the order of June 13, 1888, as "permit" funds, subsequently, by the order of February 6, 1897, styled the "Deposit and Assessment Fund." There never was any law authorizing the District or its Commissioners to enter into this business of street improvement with the funds of private parties, nor making funds contributed by the latter for such purpose moneys of the District, or moneys for which it or any of its officials were accountable. On the contrary, as will be presently

shown, the Commissioners were expressly prohibited from making any contracts for anything, except in pursuance of appropriations previously made by law.

It will be further seen upon an examination of this order of June 13, 1888, that, while the sixth section requires the Auditor to debit himself with moneys received from the Collector of Taxes upon requisitions made as provided in section 1, and to credit himself with payments upon vouchers duly certified and approved as provided in sections 2 and 7, this was merely a matter of book-keeping as to sections 1 and 2, all moneys under the requisitions provided for in them coming into the hands, not of the Auditor, but of the pay clerk, who gave bond with approved surety for the faithful performance of his duties, while the payments with which the Auditor was to credit himself under section 7 were, each, of a specified sum, payable to a particular depositor, of the balance in that depositor's favor upon an account stated with him individually, the requisition authorized being one for "any balance that may appear in his favor," the receipt of which depositor, upon his own original certificate, to be the voucher for the amount so repaid. The moneys deposited were to be in the custody, not of the Auditor nor deposited to his credit in the Traders' Central, or any other bank, but of the Collector of Taxes (Rec., p. 17), who should not pay the amount "except upon requisition of the Auditor, approved by the Commissioners." If the plaintiff's case had arisen while this order was in full force, it is plain that it was not a prescribed rule or regulation imposing upon the Auditor any of the duties of which violation is alleged in the breaches assigned, or upon his sureties responsibility for performance by him of any of them. It will be further noted, as was observed in its opinion by the Court of Appeals, that section 7 of this order of June 13, 1888, is without relevancy to the present case.

It related, exclusively, to any balance of the private owner's deposit for the whole-cost work which might remain after the work had been completed and fully paid for, which balance the order provides the Auditor shall pay to the private owners by requisition or the Collector of Taxes who, not the Auditor, was to be the custodian of these deposits, the depositor's receipt upon his certificate of deposit to constitute the Auditor's voucher. No breach of any such duty is charged, or intimated, in the declaration.

It will be noted, further, that the order in question, being passed in 1888, was six years prior to the Act of August 7, 1894, referred to at page 11 of the Record, which last-named act is the authority under which the so-called "half-cost work" was done, and is the only authority for doing any work with moneys contributed for the purpose by private property owners. It follows that the order of June 13, 1888, applies exclusively to a class of transactions for which there was no legal warrant, and the funds relating to which were not moneys of the District of Columbia for which it was or is accountable, for which its officers are liable, or which it has any standing to sue for or recover from the sureties upon the official bond which is the subject of suit in this case. Nor is the case one of a mere negative want of authority; the Commissioners were prohibited, in express terms, from making any contracts, on behalf either of the United States or of the District of Columbia, except in pursuance of appropriations made by law, and not until such appropriations had been actually made. (Abert's Compilation, pp. 201, 202).

Returning to the statutes, all of which are pleaded by the amended declaration:

8. The next in sequence is the Act of Congress of March 3, 1891, providing for a "Disbursement Clerk," whom the declaration alleges to have been the same as the pay clerk

under the Commissioner's order of June 13, 1888, to pay laborers and employees of the District of Columbia, "with moneys advanced *to him* by the Commissioners, in their discretion, upon payrolls or other vouchers audited and approved by the Auditor of the District of Columbia, and certified by the Commissioners"—thus making it plainer still, if that were possible, that there was no law imposing upon the Auditor the duty of becoming the custodian of moneys, nor upon him or his sureties responsibility of accounting for them.

9. The next act was that of June 30, 1898, creating a Disbursing Officer for the District of Columbia, required to give bond to the United States for the faithful performance of the duties of his office "in the disbursing and accounting, according to law, for all moneys of the United States and the District of Columbia that shall come into his hands." The untenableness of the claim below that this act recognized the Auditor as disbursing officer, rests not only upon the absence of such recognition in it, but in its express negation of such a claim by its proviso, "That hereafter advances in money shall be made on the requisition of the Commissioners to the said disbursing officer *instead of to the Commissioners,* and he shall account for the same *as now required by law of the said Commissioners";* showing that it was not the Auditor, but the Commissioners, to whom the advances were made, and by whom it was to be accounted for, under the law as it existed prior to the act.

10. The only remaining statute is that of July 1, 1902, which provided that the Auditor of the District of Columbia should "continue to prepare and countersign all checks issued by the Disbursing Officer," and that no checks involving disbursement of public moneys by the Disbursing Officer should be complete unless countersigned by the Auditor.

The foregoing are all the laws set forth or referred to in the plaintiff's amended declaration, and, it is believed, all the laws which exist, in reference to the duties of the Auditor. There was, it is true, the Act of August 7, 1894, above referred to, which provided that property owners requesting improvements under the permit system should deposit an amount equal to one-half of the estimated cost of such improvements with *the Collector of Taxes,* who should deposit all moneys so received in the United States Treasury to the credit of the Permit Fund; that, upon completion of work so done at the request of property owners, *the Commissioners* should repay to the current appropriation for assessment permit work, out of this Permit Fund, a sum equivalent to one-half of the cost of the work, and should return to the depositors, from that Fund, any surplus that might remain over and above one-half of the cost of the work, and the declaration alleges that this re-payment to the appropriation for assessment and permit work, and the return to the depositors from the Permit Fund, "were duties which were required of the said Auditor"; but no law existing, nor is any prescribed rule or regulation pleaded, imposing such duties upon him, the allegation in question being a mere legal conclusion by the pleader.

The amended declaration further avers that, in the course of administration, the Commissioners found it expedient that all work done by the District as the result of cuts made in streets, avenues, roads and alleys, should be paid for from a fund known as the Deposit and Assessment Fund, which was whole-cost work, *i. e.,* work to be paid for with money voluntarily given by private persons for the purpose, wholly unauthorized and in fact prohibited by law as above shown; and that, by an order passed February 6, 1907, they provided that, for convenience in keep-

ing the accounts in case of repairs of cuts in pavements and other work done by the District, which were paid for from private deposits, a general account should be opened styled "Deposit and Assessment Fund," and that all material and labor for such work should be charged against that Fund, to be paid by assessments against the deposits made for such purposes, this order of February 6, 1897, being the only rule, regulation or order pleaded by the declaration, other than those above mentioned in connection with the several statutes referred to in it. The declaration then alleges that the duties of the Auditor under the two orders dated, respectively, June 13, 1888, and February 6, 1897, "require that said Auditor should keep accounts with individual depositors of moneys which they had deposited with the Collector of Taxes to reimburse the District of Columbia for expenses, *which was whole-cost work* done on public streets, avenues, alleys, roads and spaces by the District *at the solicitation of individual citizens, and for their benefit"*; that, after requisition made by him and approved by the Commissioners, he was required "to receive the said money so drawn on the said requisition and to deposit the same in some bank or banks to his credit as Auditor of the District of Columbia, to be held to reimburse the appropriations out of which moneys had been expended to do said work, or to pay direct from the said moneys in his hands as aforesaid the actual cost of labor and materials for the whole-cost work performed as aforesaid, and to return to individual depositors the amount of money to their credit and unexpended"; but here, also, no prescribed rule or regulation, nor any order, making these several acts, or any of them, the duty of the Auditor, is pleaded or referred to, or exists, in those orders or elsewhere.

To the amended declaration, the defendant sureties again

interposed their demurrer, upon the same ground, namely, that there was no law, nor any rule or regulation pleaded, under which the defendant Petty was chargeable with the custody of, or othrwise accountable for, any of the moneys in the declaration mentioned, which demurrer was fully argued, this time before Mr. Justice Wright, who in a brief written opinion (Record, pp. 19-20) expressed the view that the clause in the bond, "as the law and orders governing said service shall require," referred, not to the manner in which moneys may have come into the Auditor's hands, but rather to the method of accounting for it; "that is, the purpose of the bond is primarily to hold the Auditor for all public moneys received by him, and secondarily, to require him to account according to whatever, if any, system of accounting happened to be provided for by the law and orders governing said service"; but the learned Justice sustained the demurrer on the ground that it was necessary to the statement of a cause of action that the declaration should set forth that the moneys for which it is claimed Petty failed to account "came into his hands," that there was nothing in the first, second, third and fourth paragraphs of the declaration to show that the moneys were ever either actively or constructively in his possession; and that the charge of the fifth paragraph, that "the said checks *or* the proceeds thereof were unlawfully used by the said Petty, was empty, in that it charged neither that he used the checks, nor their proceeds," and that the charge that they were "unlawfully used by the said Petty in his capacity as such disbursing agent," was, simply, "a conclusion of law, not an averment of fact"; that, if he made use of the checks or their proceeds, the manner of the use should be set out, so that the opinion of the Court could then be taken as to whether such use was unlawful, and that, therefore, none of the paragraphs or assignment of breaches con-

tained any direct averment that the defendant Petty ever had any moneys in his possession.

Thereupon the plaintiff again amended his declaration to the following extent, only:

By adding, in each of the five assignments of breach, after the word "Columbia," the words "which came into his hands," so that each of the assignments would read, "that said defendant Petty, as Auditor, as aforesaid, failed to account for moneys of the District of Columbia *which came into his hands* represented by checks of the amounts, dates and numbers given below," etc.; and, secondly, by striking out the word "or" in the fifth assignment of breach, so that the phrase in which it occurs may read "that such checks *and* proceeds were unlawfully used"—again leaving that allegation to rest merely as a conclusion of the pleader, with no facts alleged in its support, and still failing to allege that any moneys came into the hands of Petty.

To the declaration as thus amended the surety defendants again demurred, and the present question is whether there was error below in sustaining the demurrer, and in the denial of a motion for further leave to amend.

The foregoing is believed to present a full and correct summary of all the facts set forth in the declaration, as finally amended.

Points and Authorities.

At the hearing of the first demurrer, before Mr. Justice Barnard, the question discussed and decided was, Whether, there being no law or statutory requirement to that effect in the case, it was necessary, in order to maintain the action, to plead some prescribed rule or regulation under which the Auditor was chargeable with the custody of or

accountability for the moneys described in the declaration, which question was decided in the affirmative.

At the hearing of the second demurrer, the question was, Whether the orders pleaded, taken in connection with the statutes also referred to, in the amended declaration, imposed such duty upon the Auditor, the decision of which question was obviated by the construction put upon the language of the bond by the learned Justice before whom the second demurrer was heard, namely: That the words in the condition of the bond, "as the law and orders governing said service shall require," referred to the manner of accounting by the Auditor, and not to the coming of money into his hands. This ruling, in the first place, is, of course, incapable of being reconciled with the decision in the previous demurrer; and, in the second place, neither decision, nor both of them had they agreed, were conclusive of the law when the case again came before the Court below (Calder vs. Haynes, 7 Allen, 387; Post vs. Pearson, 108 U. S., 418, 422).

The questions presented by the third demurrer may be regarded as four, namely:

I. Did any law exist, or were any rules or regulations duly prescribed for the government of the civil service of the District of Columbia pleaded, under which the defendant Petty was chargeable with the custody of, or was otherwise accountable for, any of the moneys in the declaration mentioned?

II. In the absence of such a law, and if the liability depends upon such a prescribed rule or regulation, could there be recovery under the declaration without its being pleaded?

III. Does the condition of the bond, that the defendant Petty should "faithfully and efficiently perform all the duties of his said office, as provided for by law, and the rules and regulations from time to time duly prescribed for

the government of the civil service of the said District, and shall well and truly pay over, disburse and account for all moneys which shall come into his hands as the law and orders governing said service shall require," necessitate some law or some prescribed rule or regulation, under which money should come into his hands, as the condition and measure of the liability of his sureties to account therefor, or does it mean, merely, that he will account *in such manner* as the law and orders governing said service should require for moneys coming into his hands, however irregularly, and although there was no law or prescribed rule or regulation under which he was properly their custodian?

IV. Even if the latter should be the true construction of the bond, does the plaintiff's declaration, as finally amended, entitle it to recover?

I.

Does any law exist, or has the plaintiff pleaded any rule or regulation duly prescribed for the government of the civil service of the District of Columbia, under which the defendant Petty was chargeable with the custody of, or was accountable for, any of the moneys in the declaration mentioned?

It has not heretofore been contended, nor can it be now, that there is any statute, or law, making the Auditor of the District of Columbia a disbursing officer, or charging him with the custody of or accountability for any moneys of the District of Columbia. All the statutes bearing upon that office are cited in the first amended declaration, and are fully summarized above.

The only rules or regulations suggested by the amended declaration as imposing that duty or creating that accountability, after the decision of the Court under the first demurrer had established the necessity of pleading such rules

and regulations if any existed, are the orders of June 13, 1888, and February 6, 1897, both of which are discussed *supra*, pp. —.

With respect to the order of June 13, 1888, passed as above noted six years before the act of 1894, which provided for street improvement or repair one-half the cost of which should be borne by private owners, and which is the only Act authorizing work to be done at private owners' cost at all, it is plain that so much of that order as relates to "deposits for permit work" applies to whole-cost work, done by the Commissioners, not merely without the authority of any law, but in violation of statutes which prohibited their making any contracts except in pursuance of appropriations previously made; that such deposits were, accordingly, simply private transactions between the Commissioners, the property owners making the deposits, and the contractors or mechanics and laborers doing the work, under which the deposits did not and could not become public moneys, belonging to the District, of which any public official was the legal custodian, or for which the sureties upon any public official bond could be held liable; while with respect to so much of that order as relates to "Plumbers' or Engineers' License Fund," there is, in the first place, nothing in the order of June 13, 1888, nor in any other order pleaded, nor in any statute, which makes the Auditor the custodian or disbursing officer of those license funds, nor in the second place, is there anything in the declaration to connect these plumbers' license funds with any of the breaches assigned.

Even if the whole-cost work, to which the order of June 13, 1888, exclusively relates, had been authorized by law, the only part of that order under which any moneys could come into the hands of the Auditor was the seventh section, providing for the receipt by him, not of any mon-

eys belonging to the District, but of the unexpended balance belonging to the private depositor, and for the payment of that fund, not to the District, but to such private depositor, through a requisition drawn by the Auditor on the Collector of Taxes for the balance due the depositor, which the Collector could only pay after it had been approved by the Commissioners. No violation of this duty is alleged by the declaration, and, if violated, it would have left in the hands of the Auditor, not public moneys belonging to the District, but private moneys belonging to the depositor.

Further, and with respect to the order of February 6, 1897, the declaration is wholly silent as to any duty upon the part of the Auditor under it either to receive or disburse moneys, for any purpose, nor does the declaration allege that the Auditor failed in the discharge of any duty imposed upon him by that order.

Neither of these orders, nor any other, provided that the Auditor should receive the moneys upon any requisition authorized by it to be drawn upon the Collector of Taxes, approved by the Commissioners or otherwise, or that he should deposit any moneys in any bank or banks to his credit, as Auditor or otherwise, or that he should hold any moneys to reimburse the appropriations out of which moneys had been expended to do either whole or half-cost work, or that he should pay out any moneys in his hands, or that there should be any moneys in his hands with which to pay the cost of labor and materials of whole-cost work, or of any work. Nor does any one of the assignments of breach refer to any duty which, by the most remote or strained construction, can be claimed to have been created by either of these orders.

The first assigned breach is, that the Disbursing Officer drew checks to the Auditor's order, by what authority does

not appear, charged to the Permit Fund, which should have been deposited by the Auditor with the Treasurer of the United States to the credit of the Appropriation, "Improvements and Repairs, District of Columbia, Assessment and Permit Work," but were not so deposited. What is there in either of the orders pleaded, or elsewhere, which authorized the Disbursing Officer to draw checks to the order of the Auditor, or required the latter to deposit such checks with the Treasurer of the United States to the credit of the appropriation named, or to any other?

The second assigned breach charges that the Disbursing Officer drew checks on the Treasurer of the United States to the order of the Auditor, charged to various appropriations of the District of Columbia, which checks should have been deposited, it is not stated by whom, in the Traders' National Bank of Washington as reimbursements of the Deposit and Assessment Fund. What provision of the orders pleaded, or of any other, authorized the drawing of such checks to the Auditor's order, or required him to deposit, or rendered him responsible for the non-deposit of, such checks in the Traders' National Bank, or elsewhere, for the purpose named, or for any purpose?

The third assigned breach charges the Auditor with drawing checks to his own order upon the Central National Bank, "intended for deposit in the Traders' National Bank, of Washington, D. C., to reimburse the Deposit and Assessment Fund," which checks it alleges were not so deposited, but were cashed, as in the case of the other assigned breaches, by some unnamed person. Under which of these orders, or under what other order, was it made the duty or brought within the province of the Auditor to have funds in the Central National Bank upon which he either could or should draw checks, to his own order or otherwise, to reimburse the Deposit and Assessment Fund

or any other fund, or which made it his duty to see to, or to be responsible for, the deposit of such checks in the Traders' National Bank, or which orders indicate that such checks, or any checks, "were intended" by any one, and, if so, by whom, for such deposit?

So as to the remaining assignments of breach; no one of them assigns any duty, or points to the breach of any duty, imposed, however remotely, by the orders of June 13, 1888, or February 6, 1897, or by any other order pleaded or referred to in the declaration.

From the history of the office of the Auditor as given in the amended declaration, it is entirely obvious that no duties involving the custody, handling or disbursement of moneys had ever devolved upon that officer, up to and including the time of the giving of the bond in suit; and one of the points discussed before Mr. Justice Barnard, and established by the uniform current of authority upon the subject, was that, while duties of a like character may be devolved upon a bonded officer after his bond is given, with the effect of charging his sureties, duties of a wholly different character cannot be imposed with that effect.

> "They are not, however, liable for after-imposed duties which cannot be presumed to have entered into the contemplation of the parties at the time the bond was executed." 2 Brandt S. & G., Sec. 660.

> "Neither the surety nor his principal is responsible by virtue of the bond for any money the collector received, not as collector—money which his office did not require him to receive or disburse." Gasson *vs.* U. S., 97 U. S., 584.

Other authorities cited to the like effect were United States *vs.* McCarthy, 1 Fed., 104; People *vs.* Tompkins,

74 Ill., 482; Skellet *vs.* Fletcher, L. R., 2 C. P., 669; Home Savings Bank *vs.* Trail, 75 Mo., 199; People *vs.* Edwards, 9 Cal., 386; State *vs.* Thomas, 88 Tenn., 491; Territory *vs.* Roberts, 1 Wyo., 318; Postmaster-General *vs.* Monger, 2 Paine, 189; White *vs.* E. Saginaw, 43 Mich., 569; City of Lafayette *vs.* James, 92 Ind., 240.

How can it be presumed to have come into the contemplation of the sureties that an Auditor, either in view of the appropriate duties of such an office as implied in its title, or as established by any existing or subsequently enacted law, would be required to assume the custody and disbursement of funds which the organic act required the Commissioners, themselves, to hold and disburse? Or to become the Disbursing Agent of Rock Creek Park? Or to be made the treasurer of a trust fund belonging to private parties under the operation of a whole-cost plan of street repair unauthorized by law and involving the making of contracts by the Commissioners for which no appropriation had been made, in violation of law? The objection, it is submitted, would be unanswerable if the case were required to turn upon it; but the objection, itself, is rendered unnecessary by the fact that no rule or regulation is pleaded which imposes financial duties or responsibility upon the Auditor of any kind, or in respect to any class of transactions whatsoever.

At all the hearings below it was urged on behalf of the plaintiff that, although the Commissioners were by the terms of the statute (Abert's Compilation, Ch. 19, Sec. 36), charged with the custody and disbursement of all moneys, assets and the like belonging to the business or interests of the District, to be disbursed upon their warrant, yet it was impossible for them personally to hold and disburse those moneys, and, therefore, that they had the implied right or authority to charge their appointees or subor-

dinates with the receipt and disbursement of them. But if this be true, could they delegate these duties to individuals holding bonded offices in no way concerned with the receipt or disbursement or money, and thereby render the sureties on the bonds of such officers responsible for these new and foreign duties, imposed upon their principals subsequently to the giving of the bonds? If the Commissioners, without any rule or regulation making it his official duty, had made use of the Morgue-Master, or of the Superintendent of Education, or of the Coroner, or of the Superintendent of Fuel, or of the Pound-Master, or of the Assessor, or of the Inspector of Gas Meters, or of any one or more of the other employees of the District of Columbia who are required to give bond for the faithful discharge of their duties, to assist in the receipt and disbursement of such moneys, can a claim be maintained that the sureties of these officials would be liable for any defalcation, embezzlement, breach of trust, or accidental loss or destruction of money by these officers while engaged in these superadded activities, outside of any legally established duty attached or in any manner germane to their several or respective official positions?

It was further argued below that, since the bond in suit is conditioned, among other things, to account for all money which might come into his hands, it must be inferred that the obligors contemplated that the Auditor might be made, although throughout the many years of the existence of his office he had not been, a general disbursing officer of the moneys of the District of Columbia. A more reasonable construction, we submit, would be that, if any custody of money was contemplated, it was only such as should be related in some way to the duties of an Auditor. As a matter of fact, the form of the bond was a general one, in use for all officers of the District.

In its brief at the hearing of the first demurrer, the moneys embraced in all but the first assigned breach were admitted to be, as they are above shown in fact to have been, "trust funds, not belonging at all to the District of Columbia," while the breach relied upon under the fifth count was alleged to have been committed by Mr. Petty, not as Auditor, but as "Disbursing Agent of Rock Creek Park." In other words, the attempt was to make the sureties for the faithful discharge by Mr. Petty of his duties as Auditor of the District of Columbia responsible, not only for personal confidences reposed in him by the Commissioners in discharging *their* duty as disbursing officers under the statute, without any law or prescribed rule or regulation authorizing such confidences, but to hold them responsible, also, to private parties for trust funds in the hands of the Commissioners, not belonging to the District, and even for acts done by Mr. Petty in his capacity as Disbursing Agent for Rock Creek Park.

II.

In the absence of a statute, and if the liability depends upon prescribed rules or regulations, can there be a recovery under the declaration without their being pleaded?

Under this head, it was argued before Justices Barnard and Wright, under the authority of Caha *vs.* U. S., 152 U. S., 211, that the Court would take judicial cognizance of municipal rules and regulations. In that case, the Supreme Court recognized the Land Office of the Interior Department as, in effect, a Court for the trial of contests over public land claims, and that the regulations prescribed by that Department to govern the interests and control the rights of the general public in such contests before it, made pursuant to express provisions of the Acts of Con-

gress, could be judicially noticed by all courts of the United States, and should stand upon the same footing as public archives, proclamations of general amnesty by the President, and the like. Municipal regulations do not stand upon that footing; and "it is but to repeat a long and well-established rule to say that the by-laws of municipal corporations * * * from the largest to the smallest, must be set forth in pleading, when sought to be enforced by an action." Harker *vs.* Mayor, 17 Wend., 199; State *vs.* Idens, 35 N. C., 522, 526, following 82 N. C., 532, and 78 N. C., 417; Cincinnati Water Works *vs.* Cincinnati, 4 Ohio, 443, 446; Tilford *vs.* Mayor, 17 Hump., 190; City of Austin *vs.* Walton, 68 Tex., 507; Moundsville *vs.* Helton, 35 W. Va., 217; Petty *vs.* May, 34 Wis., 666, 674; Porter *vs.* Waring, 69 N. Y., 250, 253; City of St. Louis *vs.* Stoddard, 53 Mo. App., 173, 179; City of St. Louis *vs.* Roche, 128 Mo., 541; State *vs.* Oddle, 42 Mo., 210, 214; Mooney *vs.* Kennett, 19 Wis., 551, 555; Cox *vs.* City, 11 Mo., 431; City *vs.* Burke, 23 Minn., 254; Bank *vs.* Mayor, 71 Md., 515, 523, even under a statute providing that the municipal ordinances might be read in evidence from a printed volume published by authority of the corporation. See further, 34 Wis., p. 674; Shawfelter *vs.* Mayor, 80 Md., 483, 487; Field *vs.* Master, 88 Md., 691, 704; Lucher *vs.* Commonwealth, 4 Bush, 440; McPherson *vs.* Nichols, 48 Kans., 428, 432; Watt *vs.* Jones, 60 Kans., 201, 206; R. R. Co. *vs.* Caldwell, 9 Ind., 397, though under a statute authorizing the municipality to make the particular ordinance; Greene *vs.* Indianapolis, 23 Ind., 102; City *vs.* Pease, 56 Ind., 505; City *vs.* McBride, 69 Ind., 244, 251; Cleanenger *vs.* Town of Rushville, 90 Ind., 258, 260; Garvin *vs.* Wells, 8 Ia., 286; Goodrich *vs.* Brown, 30 Ia., 291; Mason *vs.* Atwater, 77 Ga., 662, 667; Railway *vs.* Chamber, 9 Ill. App., 613, 619; People *vs.* Chicago, 27

Ill. App., 217; Weaver *vs.* Snow, 60 Ill. App., 624; O'Hare *vs.* Lieb, 66 Ill. App., 549; Rockford Ry. Co. *vs.* Matthews, 50 Ill. App., 267; Elisabethtown *vs.* Loffler, 23 Ill., 90; Stevens *vs.* City of Chicago, 48 Ill., 498; R. R. Co. *vs.* Godfrey, 71 Ill., 500; Burkley *vs.* Eisendisch, 88 Ill. App., 364; Dill. Municipal Corp., 4th Ed., Sec. 85; Case *vs.* Mobile, 30 Ala., 538; Farnham *vs.* Mayor, 54 Ala., 263; Garland *vs.* Denver, 11 Colo., 524.

If there are any opposing authorities, counsel on neither sire appear to have discovered them.

III.

Does the condition of the bond require the existence of some law, or some prescribed rule or regulation, under which money should come into the hands of the Auditor, as the condition of the liability of the sureties to account therefor, or do those words refer, merely, to the *manner* in which he should account, as seems to have been the view of the lower Court upon the hearing of the second demurrer (Record, p. 19)?

It is a well-established rule of construction that, in construing any instrument, the Court places itself in the position, or "shoes," of the contracting parties. On May 1, 1888, when the bond was given, the office of Auditor of the District of Columbia had existed for eighteen years, during all of which time the Auditor had never been either a money-receiving or money-disbursing official. If he should ever become such an officer, it must necessarily be through the enactment of some new law, or by the prescribing, by competent authority, of some rule or regulation, imposing duties of that character upon him.

Is it not reasonable, or natural, that this was the contingency contemplated by the contracting parties? Or is it

the reasonable and natural presumption to suppose the contemplation by them of the establishment by some new law, or by some new rule or regulation thereafter to be prescribed, of a new manner or method of accounting for moneys, by an officer who was not and who had never been charged with any duty of receiving, keeping or disbursing moneys at all? We submit that, looked at from the standpoint of substance, the former is the only possible reasonable construction.

Considered from the standpoint of a reasonable purpose or object, the same construction must result. It is not unreasonable that the obligee of the bond, on the one hand, should desire, and require, security that, if, under some new law or duly prescribed rule or regulation, any of its officials should be entrusted with the custody of moneys, the sureties on his bond should undertake for a faithful accounting for the same; nor, on the other hand, that the sureties should require that, if they were to be held for any financial responsibility of their principal, who bore no such responsibility at the time of the giving of the bond, it should be created by some law, or by some duly prescribed rule or regulation, so that they might have notice of it, and the opportunity to protect themselves in regard to it. A requirement that a $20,000 bond be taken to insure a mere manner or method of accounting, it is submitted, is neither a plausible construction, nor a reasonable one.

Looked at grammatically, and we have the same result. The phraseology is, not to "account as the law and orders governing said service shall require for all moneys that shall come into his hands," but to "account for all moneys that shall come into his hands as the law and orders governing said service shall require." It is the moneys, not the accounting, which is the immediate subject, even as a

matter of grammar, of the qualifying phrase "as the law and orders governing said service shall require."

If any further consideration were necessary, this is a case of voluntary sureties, to whom the rule *strictissimi juris* applies, and in whose favor doubtful questions of construction are to be resolved.

In United States *vs.* Hough, 103 U. S., 73, the bond of an Internal Revenue collector, executed September 16, 1864, for the faithful return of moneys received for revenue stamps, etc., "delivered and to be delivered under the Act of Congress, approved March 3, 1863," was held not to be enforcible against the sureties for stamps delivered under the later Act of June 30, 1864, although that Act repealed the Act of March 3, 1863, and antedated the giving of the bond, so that there were no stamps possible "to be delivered" under the Act of 1863, at the very time the bond was entered into.

In United States *vs.* Boecher, 21 Wall., 652, the surety on a distiller's bond for payment by him of the taxes in respect to the business carried on by him, "at, to wit, Hudson Street and East Avenue," was held not liable for business carried on at Hudson and Third Streets, although the only business of the principal was conducted at the latter and never at Hudson Street and East Avenue, and this notwithstanding the *videlicet*.

The rule, however, is too familiar to require the citation of authorities or further discussion.

IV.

But, if the opinion accompanying the decision of the demurrer to the first amended declaration (Record, pp. 19-20) were required to be regarded as conclusive of the points there decided, the fact remains that the plaintiff's

declaration as finally amended failed to state a case which, even under that opinion, entitled to recover.

As pointed out above, the second amendment to the declaration, on which the case was finally heard, simply added to each of the five assigned breaches, after the words "District of Columbia," the words "which came into his hands"; making them read as amended, "that said defendant Petty as Auditor failed to account for moneys of the District of Columbia which came into his hands, represented by checks of the amounts, dates and numbers given below," etc., "which said checks should have been deposited by the said defendant James T. Petty as Auditor as aforesaid," etc., "but said checks were not so deposited, but were endorsed by the said Petty as aforesaid, and afterwards cashed at the Central National Bank of Washington, D. C., and the proceeds of the said checks so cashed were never in any manner paid or accounted for to the said plaintiff, or deposited in any bank or in the Treasury of the United States, to its said credit," etc.; the only remaining amendment being a change of the word *or* to *and*, in the fifth breach assigned, making the allegation read, "that the said checks and the proceeds thereof were used by the said Petty in his capacity as such disbursing agent, and the said checks so drawn by him were drawn without authority of law."

With respect to the first of these two amendments, it will be observed that, still, the allegation is, only, in the preliminary recital of each assignment of breach, that Mr. Petty "failed to account for moneys of the District of Columbia which came into his hands, *represented by checks* of the amounts, dates and numbers given below," followed by an allegation that these checks should have been deposited by him with the Treasurer of the United States, or in the Central National Bank, or in the Traders' National

Bank, that they were not so deposited, but were "afterwards cashed," it is not stated by whom, and with no allegation that a single dollar of the moneys represented by any of the numerous checks mentioned were, in the language of Mr. Justice Wright's opinion, "ever actually or constructively in the possession of the defendant," or that any of "the moneys for which it is claimed he failed to account 'came into his hands.' "

With respect to the second of the amendments, applicable only to the fifth assigned breach, it consists merely in changing the word *or* to *and*, and, as amended, amounts to no more than the allegation, as a conclusion of law as pointed out in Mr. Justice Wright's opinion, that the proceeds "were unlawfully used by the said Petty in his capacity as such disbursing agent." "If he did make use of checks or proceeds, the manner of the use should be set out; the opinion of the Court may then be taken as to whether such use was unlawful; but, as it stands, the entire sentence first quoted contains no averment of fact and is therefore to be disregarded on demurrer. There appearing in none of the paragraphs any direct averment that the defendant Petty ever had the moneys in his possession, and no averment of facts from which that conclusion follows, the demurrer must be sustained."

The Breaches Assigned.

1. The first breach assigned is that, under the Act of August 7, 1894, property owners requesting improvements under the permit system were required to deposit in advance with the Collector of Taxes an amount equal to one-half of their estimated cost, which money should be deposited by the Collector in the United States Treasury to the credit of the Permit Fund; that, upon the completion of the work thus requested, *the Commissioners* should re-

pay, out of this Permit Fund to the current appropriation for such work, a sum equivalent to one-half of its cost, and should return to the depositors, from that fund, as application might be made therefor, any surplus that might remain over and above one-half of the cost of the work. It does not allege that the Act, nor any prescribed rule or regulation, imposed upon the Auditor the custody or disbursement of any part of this Permit Fund. The declaration, it is true, alleges "that the said repayment to the appropriation for Assessment and Permit work and the said return to the depositors from the said Permit Fund above mentioned were duties which were required of the said Auditor"; but this is simply the conclusion of the pleader, unaccompanied by any averments of fact upon which, as said by Mr. Justice Wright, the opinion of the Court may be taken as to the correctness of that conclusion. By whom, and how, was it "required of the said Auditor" to make repayment to the appropriation for Assessment and Permit work, or to make return to the depositors from the Permit Fund? Or, leaving the reference in the declaration to the Act in question (p. 11), and coming to that of the first assignment of breach, at p. 13, no facts or fact whatever are pleaded to enable the Court to sustain the conclusion of the pleader that the checks therein referred to "should have been deposited by the said James T. Petty, as Auditor aforesaid, in accordance with law and the rules governing the conduct of his office with the Treasurer of the United States to the credit of the appropriation 'Improvements and Repairs.'" There is, in the first place, no allegation of any fact or facts to show that it was his duty, in any capacity, to deposit them, and still less that it was his duty to do so in his capacity as Auditor, an office relating entirely to the examination and statement of accounts.

2-3-4-5. It is apparent upon the face of the second, third, fourth, and fifth assignments of breach, and it was conceded below, that they relate entirely to whole-cost work—*i. e.*, that the moneys referred to in them consisted of sums advanced by private property owners for the purpose of street repair and improvement entirely at their cost. It is, also, plain that there was no law for the doing of such work, or for the receipt of such moneys; that, therefore, they never were or could have been public moneys; that no public official was legally chargeable with their custody; that the sureties on no public official bond were liable for them; that they did not belong to the District, and that the District is not entitled to maintain a suit for their recovery, all of which has been above already fully pointed out.

Some contention was urged below that, included in this whole-cost fund, were moneys required to be paid by street railway companies in connection with street repairs, the salaries of special policemen at street railway crossings, and the like. To this there are several answers. In the first place, as may be seen by reference to the statute (the Act of June 11, 1878, 20 Statutes at large, p. 106), the street railway companies are not required to make a deposit for street repairs, the provision of law being that they shall bear the expense of paving between their tracks and for a space of two feet beyond them; that, if they refuse to do this work of paving, the District may do it, and, if the cost is not paid by the street railway companies on demand, the District may issue certificates of indebtedness against their property to cover the cost. No deposit for the doing of the work is provided, nor is there the slightest reference to the Auditor in connection with the subject, either in the statute, or in any rule, regulation or order pleaded. Support for the contention is equally lacking as to the salaries of street-crossing policemen. A further and conclusive answer is

furnished by the fact that the contention is in direct antagonism to the allegations of the declaration, at pp. 10-11, specifically stating that the so-called deposit and assessment or whole-cost fund, which are the moneys specified in the second, third, fourth and fifth breaches assigned, were for "repairs made by the District of cuts in pavements and other work done by the District, which were paid for from private deposits," and that the alleged duties of the Auditor in connection with the matter were to "keep accounts with individual depositors of moneys which they had deposited with the Collector of Taxes to reimburse the District of Columbia for the expenses, which as whole-cost work done on public streets, avenues, alleys, roads, and spaces by the District at the solicitation of individual citizens and for their benefit."

Such being the state of the pleadings, we submit that, not only was the judgment of the Court below correct, but any other judgment was impossible.

The Denial of the Application to Amend.

The remaining contention on the part of the appellant is that the Court below erred in refusing its application for further leave to amend.

That the grant or refusal of leave to amend is a matter of discretion in the Court below, and is not reviewable on appeal, is elementary, and has repeatedly been decided by the local Courts. Chunn *vs.* Ry Co., 23 D. C. App., 551, 562 ,and citations, affirmed by this Court, 207 U. S., 302, 305; Sshrot *vs.* Schoenfeld, 23 D. C. App., 421, 426.

If reviewable, the history of the case amply justified the Court's action. The demurrer to the original declaration having been sustained February 16, 1906, with leave to amend within thirty days (Record, p. 6), and this time

being extended for fifteen days further on March 16, 1906 (Record, p. 7), the first amendment to the declaration was not filed until December 12, 1906. The demurrer to the declaration as amended having been sustained on October 18, 1907, leave to amend was not obtained until January 5, 1909, and then informally and without notice to defendant's attorneys (Record, pp. 20, 21-2). In the meantime, namely, on April 26, 1908, one of the original surety defendants had died, and settlement of his estate was being held up by the pendency of this suit.

In the third place, the application to amend was merely oral, unaccompanied by the showing of any cause, or of the nature of the amendment proposed.

The Brief for Plaintiff in Error.

Since the foregoing was prepared for the printer, counsel for the defendants in error have received a copy of the brief in this Court on behalf of the plaintiff in error, reply to which must be made in the form of an addendum to the defendants' brief as originally prepared.

In this brief, for the first time, claim is made that the so-called "whole-cost work" was authorized by law—on the ground that in the Appropriation Act for the District of Columbia of March 3, 1883, and for subsequent years, items of appropriation were contained "for materials for permit work." The brief asserts, contrary to the allegation of the declaration, that this "whole-cost" work consisted of street repairs, the materials for which were furnished by the District, and the labor for which was paid by the voluntary deposits of private parties. We learn further, from the brief only, that in their report to Congress for the year 1883, the Commissioners of the District of Columbia set forth a

class of repairs which they designated permit work, in which the District issued materials to parties who would pay the cost of laying them, amounting to "a voluntary assessment in which the District pays about two-thirds and the parties benefited one-third."

That this is a new proposition, made for the first time in this Court, is apparent, not only from the Opinion of the Court of Appeals in the case (37 App. D. C., 156, 167), in which, with all the aid afforded it by the learned counsel for the plaintiff in error, the Court declares, "We can find no statute authorizing the District to receive or expend such permit work deposits," but also from the amended declaration, which sets out *seriatim* every Act of Congress relied upon by the plaintiff in error in the premises, including the Act of February 6, 1897, under which "half-cost" work was done, but wholly omits reference to any acts which authorize what the brief now claims was "permit" or "whole-cost" work.

Not only so, but the declaration affirmatively negatives the claim, made for the first time here that the "whole-cost" work, to which the second, third and fourth alleged breaches relate, consisted of work in which the materials were furnished by the District and the labor paid for by the voluntary deposits of private owners. On the contrary, it alleges (Rec., p. 10), that the private deposits constituted what was styled the "Deposit and Assessment Fund," that all *material and labor* for such work was to be charged against that deposit, and to "be paid by assessments against the deposits made for such purposes;" and again (Rec., p. 11), that this whole-cost work was done "at the solicitation of individuals and for their benefit," and that "when said whole-cost work was done for which said deposit was made, the said Assessor was required to make requisition, approved by the Commissioners, for the amount thereof

upon the Collector of Taxes, and to receive the said money so drawn on the said requisition, and deposit the same in some bank or banks to his credit as Auditor of the District of Columbia, to be held to reimburse the appropriations out of which monies had been expended to do said work, or to pay direct from the said monies in his hands as aforesaid the actual cost of labor and material for whole-cost work performed as aforesaid, and to return to individual depositors the amount of money to their credit and unexpended."

It is entirely plain, therefore, upon the face of the declaration, that if there was, as the brief claims, a "permit" fund contributed by private owners to pay the cost of laying materials furnished by the District, and even if this Court can take cognizance of such a fund, the existence of which is alleged, not in the Record, but in the brief of the plaintiff in error here, this was not the fund as to which breaches of the Auditor's bond are alleged in the declaration, that fund, by the express terms of the declaration, being one contributed by the private owners for paying the "whole-cost" of street repairs, both materials and labor included.

In contracting, therefore, for the repair of streets to be paid for, not out of appropriations previously made, but, as to materials and labor, from voluntary deposits collected from private property owners, the Commissioners neither represented nor bound the United States, or the District of Columbia. The funds collected by them were not collected pursuant to any law, belonged neither to the United States nor to the District of Columbia, were public monies in no sense, no law and no prescribed rule or regulation made the Auditor their custodian, and their custody was in no way an official duty for which the sureties upon his bond can be held accountable.

Even under the Act of August 7, 1894, providing for

half-cost work, the Commissioners must contract and make payments only from monies appropriated by Congress, being thus required to conform literally to the law above cited from Abert's Compilation, the monies collected from the private property owners being then, after completion of and payment for the work, passed to the credit of the funds appropriated.

It is alleged in the brief for plaintiff that the trial courts, and the Court of Appeals, denied that there was authority to take the bond in suit, and considerable space is devoted to the discussion of that question, and to the question whether, if void as a statutory bond, it is not nevertheless good as a voluntary bond. The right to take a bond of the Auditor conditioned for the faithful discharge of the duties of his office is expressly conferred by Section 10 of the Act of Legislative Assembly of August 23, 1871, pleaded at p. 8 of the Record, which section, also, defines the duties of the office. The demurrants have never claimed that the bond is invalid, but do contend that the declaration states no breach of it. So far from denying that there was authority to take the bond, the opening sentence in the opinion of the Court of Appeals, after stating the facts, and its only reference to that subject is (Rec., 31), "Appellees made no question as to the right of the District to take the bonds in suit, their sole contention being that the declaration states no breach of it."

That, under a general demurrer, matters of form and surplusage cannot be considered, etc., etc., are, also, propositions which have been raised and discussed in this case on behalf of the plaintiff in error only, the defendants in error having at no time questioned them.

In the Howgate case (3 D. C. App., 277), affirmed under the title of Moses vs. United States, 166 U. S., 571, Howgate had been appointed "Property and Disbursing Officer" of the Signal Service of the United States, and had given bond with sureties in that capacity (set out in full in 166 U. S., 573-4), conditioned that he should "carefully discharge the duties thereof, and faithfully expend all public money and honestly account for the same and for all public property which shall or may come into his hands on account of the Signal Service, United States Army." The attempted defense was, not that no public monies had come into the hands of Howgate, or that he had faithfully expended and honestly accounted for the same, but that there was no such office as "Property and Disbursing Officer," and that, therefore, the bond was void. Both the Court of Appeals and this Court held the contention bad, for the reason that there was such an office, and for the further reason that, if there had not been, the Chief Signal Officer had the right to take a voluntary bond from a subordinate to whom he entrusted public monies, for which monies the Signal Officer himself was accountable. In the case at bar, the contention of the demurrants is, not that there was no such officer as claimed, nor that his bond was invalid for want of legal authority to execute it or upon any other ground; but that its condition was that the principal should faithfully and efficiently perform all the duties of his said office *as provided for by law and the rules and regulations from time to time prescribed for the government of the Civil Service of said District,*" and that he should "well and truly pay over, disburse and account for all monies that should come into his hands as *the law and orders governing said Service shall require*"; that the declaration does not allege the non-performance of any duty provided for by law or by any prescribed rules or regulations; and that there is no law, and

no rule or regulation was pleaded, under which Mr. Petty was chargeable with the custody of or otherwise accountable for any of the monies in the declaration mentioned.

Howard vs. United States, 184 U. S., 676, is no more pertinent to the case at bar, the point decided in that case being, simply, that the clerk of a United States Court who, pursuant to an order of the court, receives money for the benefit of one of the parties to a suit, is acting within the scope of his duties, Section 828 of the Revised Statutes, in terms, providing a commission to such officers "for receiving, keeping and paying out money in pursuance of any statute or order of court." If, in the case at bar, there was any law, rule or regulation authorizing the Auditor of the District of Columbia to receive monies pursuant to the direction of his superior officers, accompanied by an allegation of such direction, or allowing him a commission for monies to be received and disbursed by him, the cases might in some respects be regarded as analogous. The difficulty in the case at bar is the entire absence of any law, prescribed rule or regulation making the Auditor the custodian of monies, for any purpose, or under any circumstances, and thus bringing the alleged breaches within the terms of the bond.

It is respectfully submitted that there was no error in the judgment below, and that it should be affirmed.

J. J. DARLINGTON,
Attorney for Surety Defendants in Error,
Church and Deering.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 316.

DISTRICT OF COLUMBIA

vs.

JAMES T. PETTY ET AL.

BRIEF FOR APPELLEE JESSE R. WILSON.

JACKSON H. RALSTON,
THEODORE L. SUTRO,
WILLIAM R. HOUGHTON,
Attorneys for Appellee Jesse R. Wilson.

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vs.

JAMES T. PETTY ET AL.

BRIEF FOR APPELLEE JESSE B. WILSON.

It is not the desire of the undersigned to restate the facts of this case or to enter largely into the argument. There are, however, certain points which, in our opinion, deserve additional discussion as going to the very crux of the situation.

Mr. Petty gave his bond as auditor on May 1, 1888. The terms of this bond provided that he should—

> "faithfully and efficiently perform all the duties of his said office as provided by law, and the rules and regulations from time to time duly prescribed for the government of the civil service of said District; and shall well and truly pay over, disburse and account for all moneys that shall come to his hands as the law and orders governing said service shall require."

It seems to us opportune to inquire, first, generally as to what is meant by the word "auditor." In State *vs.* Hastings, 10 Wisconsin, 525, 530, a State auditor was described as one whose business it was to examine and certify accounts and claims against the estate and to keep an account between the State and its treasurer.

In the case of State *vs.* Brown, 10 Oregon, 222, the definitions of the word "auditor" were summed up as follows:

> "Abbott defined the powers of such an officer as follows: 'An officer of government whose function it is to examine, verify, and approve or report accounts of persons who have had the disbursement of government moneys, or have furnished supplies for government use.' 1 Abb. Law. Dict., III. Burrill's definition of the term *auditor* is this: 'An officer or person whose business is to examine and verify the accounts of persons intrusted with money. A person appointed to examine a particular account and state or certify the result; in doing which he is said to *audit* the account. I Burrill Law Dict., 163.'"

From the general meaning of the word, therefore, the sureties upon the bond of Mr. Petty believed that they were protecting against loss at the hands of one whose duty it was to examine and verify accounts.

Turning from the general meaning of the word to its specific application in this case, we find that Mr. Petty was to perform the duties of auditor "as provided for by law," etc. When we examine the amended declaration we learn what the law was, and we find that originally the mayor, with the consent of the board of aldermen (16 Stat., p. 191), was authorized to appoint an auditor and a comptroller and the duties of the auditor are set out in the first paragraph of the amended declaration and show very clearly that he had no power to handle money. We also find that the duty of the comptroller, whose office was subsequently combined with that of the auditor, likewise had no reference whatsoever to the handling of moneys, which were to be

deposited by the collector to the credit of the City of Washington.

Next we discover that in February, 1871 (16 Stat., p. 419), the District of Columbia was created a body corporate, succeeding to the prior form of government, with power to elect and appoint such ministerial officers as might be necessary, and that the legislative assembly provided for prescribed anew the duty of the auditor, the deputy auditor, and the comptroller, fixing the amount of bond to be given by each. Again, we discover that no one of these officers has any power to receive or handle any money whatsoever.

We next come to the act of June 28, 1874 (18 Stat., 116), creating the Board of Commissioners, with authority to consolidate offices, etc., and we discover that the Commissioners thereunder consolidated the offices of auditor, comptroller, and deputy comptroller (evidently it should be auditor) into the office of auditor, still leaving the auditor without the slightest power to receive money or the slightest obligation to account for moneys coming into his hands.

We then find an act of Congress, approved March 3, 1881 (21 Stat., 466), requiring the auditor to make a monthly account of all disbursements to the accounting officers of the Treasury, and that the Commissioners, by a further order, passed December 8, 1882, abolished the office of Comptroller. Why this should have been passed, there having already been an order of like tenor passed August 11, 1876, does not appear.

This states in brief the condition of the law up to May 1, 1888, when the bond was given, and we see from it that at no time and by no order or law was the auditor authorized to receive or disburse any funds whatsoever.

It is contended that the auditor was, by a later order of June 13, 1888, authorized to receive and disburse moneys and to be held accountable therefor. To this three replies are to be made: First, that such later order could not change the duties of the auditor to the prejudice of the

sureties, and this we will discuss later; second, that it is extremely doubtful whether, under the terms of this order, the auditor was to receive any money whatsoever, the disbursements of the money to be received under the order devolving upon the pay clerk, who is required to give a special bond, and, third, that even if the auditor were authorized to receive and disburse moneys under this order, he is not charged with the reception and misappropriation of any moneys coming into his hands under the conditions described in the order.

As to the third point, which we discuss first, it will be noted that the order of June 13 relates exclusively to what is called "permit work," or, in other words, half-cost work, where the property-holder puts up enough money to meet his estimated portion of the cost of improvements and afterwards receives back any overpayment. The defendant Petty is only charged for defaults of this class of funds in the first of the five paragraphs, charging him with failing to account, and as to this, it is said—

> "That said defendant Petty as auditor as aforesaid failed to account for monies of the District of Columbit represented by checks of the amounts, dates, and numbers given below which were drawn by the disbursing officer, Charles C. Rodgers, of the District of Columbia, or his deputy, and countersigned by the said Petty, as auditor of the District of Columbia, on the Treasurer of the United States, charged to the 'Permit Fund, District of Columbia,' *being half-cost work* under the said Act of Congress approved August 7, 1894, which said checks should have been deposited by the said defendant, James T. Petty, as auditor as aforesaid, in accordance with law and the rules governing the conduct of his office with the Treasurer of the United States to the credit of the appropriation 'Improvements and Repairs,' District of Columbia, assessment and permit work; but said checks were not so deposited, but were endorsed by the said Petty as auditor as aforesaid and afterwards cashed at the Central National Bank of Washington, D. C."

Turning to the order of June 13 we find that—

> "The auditor D. C. shall debit himself with the moneys received from the collector of taxes upon requisition made as provided in section 1,"

and turning to section 1 we find it stated that—

> "He" (the collector of taxes) "shall not pay out the moneys thus received" (on deposits for permit work, etc.) "except upon requisition of the auditor approved by the Commissioners."

The inference which the appellant seeks to draw is that it must have been in this manner and pursuant to this rule that the collector of taxes paid to the auditor the moneys in question, but referring to the specific charge against the auditor, we find that it is said that he failed to account for moneys of the District represented by checks drawn, not by the collector of taxes upon the requisition of the auditor, approved by the Commissioners, but drawn by the disbursing officer of the District or his deputy, and countersigned by the auditor, to the order of the auditor, on the Treasurer of the United States.

It seems evident, therefore, that so far as this item was concerned, the checks against the permit fund were not such checks as were embraced in any order of the Commissioners and their non-payment or their wrongful payment would not constitute a violation of any rule of the civil service of the District, nor was such non-payment a failure to well and truly pay over, disburse, and account for moneys coming into his hands as the law and orders governing such service required.

As to the four remaining paragraphs, charging specific failure to account for certain checks and their proceeds, it is to be said that they all refer to full-cost work, the moneys included in which in no instance belonged to the District of Columbia, and with reference to which the auditor was charged with no responsibility by any order of the Commissioners of the District of Columbia or any statute.

Going, however, for a moment to the first point above alluded to, that is that orders subsequent to May 1, 1888, could not change the duties of the order to the prejudice of the sureties, we have to say that we think we have shown clearly enough that it was no part of the duties of the auditor to handle moneys of the nature of those as to which he is said to have made default by any rule or practice prior to May 1, 1888.

On page 21 of appellant's brief, referring to the order of June 13, 1888, it is said that

> "This imposed duties on the auditor concerning permit work, but no doubt these duties had been previously performed."

The remark is not justified by anything in the record. The sureties, as we have pointed out, had no reason to suppose such duties nor anything like them had been previously performed by the auditor. The position, therefore, is that the auditor, charged with duties of one nature, after the date of the bond performed other duties with reference to money of an entirely different nature, and we come, therefore, within the language of the case of U. S. *vs.* Powell (14 Wallace, 493), greatly relied on by the appellant, but in which the very quotation made by the appellant reads, among other things, as follows:

> "It must be admitted that any substantial addition by law to the duties of the obligor of a bond after the execution of the instrument, *materially enlarging his liabilities,* will not impose any additional responsibility upon his sureties, unless the words of the bond, by a fair and reasonable construction, bring such subsequently imposed duties within its provisions."

How much stronger, therefore, must be the rule when the substantial addition is not made by law, but is by some late practice, the origin of which is not disclosed in

any manner to the court, and such practice has, if it were a valid one, materially enlarged the auditor's liabilities.

Again we read from the Powell case that

> "Where * * * the language of the bond is sufficiently comprehensive to embrace duties subsequently imposed, *of a character corresponding with those required at the date of the bond,* the construction which gives a prospective as well as a retrospective operation to the condition of the bond may well be adopted as both reasonable and just to all concerned."

Applying this language to the present case, we find that by law, the duties required of the auditor were simply such as naturally appertain to the office of auditor, at least this was the case at the time of the date of the bond, and that any attempt to charge him with the handling of money was an attempt to charge him with duties which did not correspond with those required at the date of the bond, and therefore the sureties should not be held responsible.

For the reasons above given, as well as for all the reasons recited in the brief for the remaining defendants, it is respectfully submitted that the writ of error should be dismissed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1913.

No. 316.

DISTRICT OF COLUMBIA, *Plaintiff in Error,*

vs.

JAMES T. PETTY, *et al.*

BRIEF FOR JAMES T. PETTY.

W. C. SULLIVAN,
Attorney for Defendant in Error, James T. Petty.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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STATEMENT OF FACTS.

On May 1, 1888, James T. Petty as principal, with Charles B. Church, Jesse B. Wilson and George T. Deering as sureties executed and delivered a bond to the District of Columbia in the penal sum of $20,000, upon the following condition:

"*Whereas,* the above bounden James T. Petty has been appointed to the office of Auditor in and for the District of Columbia,

NOW, THEREFORE, THE CONDITION OF SAID OBLIGATION IS SUCH, That, if said James T. Petty shall faithfully and efficiently perform all the duties of his office, as provided for by law, and the rules and regulations from time to time duly prescribed for the Government of the Civil Service of said District, and shall well and truly pay over, disburse and account for all moneys that shall come into his hands as the law and orders governing said service shall require, then said obligation to be void, otherwise to remain in full force."

The sureties, in their brief in this case, have so fully presented the history of the Auditor's Office, so far as here pertinent, and of this cause through the various amendments of the declaration in the trial court, that it is unnecessary to repeat these matters at length, nor will we attempt here to again go over the ground there covered, but, adopting what is there said so far as applicable to the case of the defendant in error Petty, will limit this brief to a few observations supplementing those already made by the sureties.

POINTS AND AUTHORITIES.

Thus limited, but two questions are presented by the record for our consideration:

First. No breach of the condition of the bond is alleged in the declaration.

Second. The principal is no more liable under the present declaration than are the sureties.

I.

The condition of the bond, above recited, was two-fold, namely:

A. That "James T. Petty shall faithfully and efficiently perform all the duties of his office, as provided for by law, and the rules and regulations from time to time duly prescribed for the Government of the Civil Service of said District";

B. That he "shall well and truly pay over, disburse and account for all moneys that shall come into his hands as the law and orders governing said service shall require."

It is evident that the only duties, which Petty undertook by this bond to perform, were such as were "provided for by law, and the rules and regulations from time to time duly prescribed for the Government of the Civil Service of said District," and the only moneys which he undertook to pay over, disburse or account for were such as should "come into his hands as the law and orders governing said service shall require." In order that a declaration upon this bond might stand proof as against a demurrer, it was essential, therefore, that it should be shown, either, that he had not faithfully and efficiently performed some duty of his office, *as provided for by law, or by the rules and regulations from time to time duly prescribed for the government of the Civil Service of said District,* or, else, that he had not well and truly paid over, disbursed and accounted for moneys which had come into his hands *as the law or orders governing said service should require.*

If there was any law prescribing the duties of the Auditor, or what moneys should come into his hands, the court would, of course, have judicially noticed them and it was unnecessary that they be pleaded; but, if there were any rules, orders or regulations for the government of the Civil Service of said District prescribing the duties of that office or the moneys which should come into the hands of the Auditor, it was essential that such rules, regulations and

orders be pleaded, otherwise the court could not know what they were, and necessarily could not take judicial cognizance of them.

> "These details are to be proven by competent evidence, and cannot, within any well-settled rule established by the decisions of the courts, be considered as embraced within the knowledge of a judge upon a trial without testimony to show the actual state of the facts. If the court could take judicial notice of the ordinances of a municipal corporation, it would involve consideration of all the numerous enactments, whether printed or otherwise, which the Common Council have adopted which relate to the subject of the controversy, and the existence of many of which might be entirely unknown to the parties or their counsel. It would open the door in many cases to mere conjecture, and involve an inquiry as to local enactments; the time when they took effect, the priority of the same, and their application to the case in litigation; which it would be difficult to dispose of without proof, and which are not properly embraced within the ordinary scope of judicial knowledge in the determination and trial of cases." Porter vs. Waring, 69 N. Y., 250; Schnaer & Co. vs. Grigsby, 132 N. Y. App. Div., 854.

> "The Circuit Court could not make plaintiffs' case other than they made it by taking judicial notice of facts which they did not choose to rely on in their pleading." Mountain View Co. vs. McFadden, 180 U. S., 533, 535; Arkansas vs. Coal Co., *et al.*, 183 U. S., 185, 190.

> "It is but to repeat a long and well-established rule to say that the by-laws of municipal corporations * * * from the largest to the smallest, must be set forth in pleading, when sought to be enforced by an action." Harker vs. Mayor, 17 Wend., 199; State vs. Idens, 35 N. C., 522, 526, following 82 N. C., 532, and

78 N. C., 417; Cincinnati Water Works vs. Cincinnati, 4 Ohio, 443, 446; Tilford vs. Mayor, 17 Hump., 190; City of Austin vs. Walton, 68 Tex., 507; Moundsville vs. Helton, 35 W. Va., 217; Petty vs. May, 34 Wis., 666, 674; Porter vs. Waring, 69 N. Y., 250, 253; City of St. Louis vs. Stoddard, 53 Mo. App., 173, 179; City of St. Louis vs. Roche, 128 Mo., 541; State vs. Oddle, 42 Mo., 210, 214; Mooney vs. Kennett, 19 Wis., 551, 555; Cox vs. City, 11 Mo., 431; City vs. Burke, 23 Minn., 254; Bank vs. Mayor, 71 Md., 515, 523, even under a statute providing that the municipal ordinances might be read in evidence from a printed volume published by authority of the corporation. See further, 34 Wis., p. 674; Shawfelter vs. Mayor, 80 Md., 483, 487; Field vs. Master, 88 Md., 691, 704; Lucher vs. Commonwealth, 4 Bush, 440; McPherson vs. Nichols, 48 Kans., 428, 432; Watt vs. Jones, 60 Kans., 201, 206; R. R. Co. vs. Caldwell, 9 Ind., 397, though under a statute authorizing the municipality to make the particular ordinance; Greene vs. Indianapolis, 23 Ind., 102; City vs. Pease, 56 Ind., 505; City vs. McBride, 69 Ind., 244, 251; Cleanenger vs. Town of Rushville, 90 Ind., 258, 260; Garvin vs. Wells, 8 Ia., 286; Goodrich vs. Brown, 30 Ia., 291; Mason vs. Atwater, 77 Ga., 662, 667; Railway vs. Xhamber, 9 Ill. App., 613, 619; People vs. Chicago, 27 Ill. App., 217; Weaver vs. Snow, 60 Ill. App., 624; O'Hare vs. Lieb, 66 Ill. App., 549; Rockford Ry. Co. vs. Matthews, 50 Ill., App., 267; Elisabethtown vs. Loeffler, 23 Ill., 90; Stevens vs. City of Chicago, 48 Ill., 498; R. R. Co. vs. Godfrey, 71 Ill., 500; Burkley vs. Eisendisch, 88 Ill. App., 364; Dill. Municipal Corp., 4th Ed., Sec. 83; Case vs. Mobile, 30 Ala., 538; Farnham vs. Mayor, 54 Ala., 263; Garland vs. Denver, 11 Colo., 524; Strickland vs. Little Rock, 68 Ark., 483; Gardner vs. State, 80 Ib., 264; Moore vs. Jonesboro, 107 Ga., 704; Taylor vs. Sanderville, 118 Ga., 68; Stott vs. Chicago, 205 Ill., 281, 290; Home, *et al.*, vs. Mehler (Ky.), 64 S. W., 918; State vs. Marmouget, 104 La., 1; Tarkio vs. Loyd, 179 Mo., 600; St.

Louis vs. Liessing, 190 Ib., 466; Boston vs. Abraham, *et al.*, 91 N. Y. App. Div., 417; New York vs. Trust Co., 104 Ib., 223, 230; Steiner vs. State (Neb.), 110 N. W., 723.

But the declaration does not show either that Mr. Petty did not faithfully and efficiently perform the duties of his office of Auditor as provided for by law and the rules and regulations from time to time duly prescribed for the government of the Civil Service of the District of Columbia, or that he did not well and truly pay over, disburse and account for all moneys that came into his hands as the law and orders governing said service required. It does not allege any rule or regulation at any time prescribed for the government of the Civil Service of the District of Columbia, relating to the duties of the office of Auditor, or otherwise, or any orders governing said Civil Service relating to the payment, disbursement or accounting for moneys coming into his hands, or, even, under which any moneys could come into his hands. Not only does the declaration fail to show any such rule, regulation or order, but no law upon these subjects has been found by any of the parties to this cause, and it is believed that no such law, rule, regulation or order exists.

The declaration, as it now stands, after reciting the giving of the bond and its condition, states that Petty "failed and neglected to faithfully and efficiently perform all the duties of his office as provided by law, and failed and neglected to faithfully and efficiently observe the said rules and regulations, and failed and neglected to truly pay over, disburse and account for all moneys that came to his hands as the law and orders governing his duties and services required, in this":

1. That he failed to account for moneys of the plaintiff in error that should have been deposited by him, as Auditor,

in accordance with the laws and the rules governing the conduct of his office, with the Treasurer of the United States, to the credit of the appropriation for " 'Improvements and Repairs, District of Columbia,' Assessment and Permit Work."

2. That he failed to account for moneys of the plaintiff in error, which, "in accordance with the law and rules and regulations aforesaid," should have been deposited in the Trader's National Bank, as reimbursements of the "Deposit and Assessment Fund, Whole Cost Work."

3. That he failed to account for moneys of the plaintiff in error intended for deposit in the Trader's National Bank, to reimburse the Deposit and Assessment Fund, where said fund was kept.

4. That he failed to account for moneys of the plaintiff in error which should have been deposited to his credit as Auditor, "for the benefit of said Whole Cost Works."

5. That he failed to account for moneys of the plaintiff in error which were unlawfully drawn by him by checks payable to his own order, as "Disbursing Agent, Rock Creek Park, D. C."

Just how, or in what manner, if at all, whether by law, rules, regulations, orders, or otherwise, it became the duty of Mr. Petty to receive, deposit, or handle, in any manner, any funds relating to " 'Improvements and Repairs,' District of Columbia, Assessments and Permit Works," or to the Deposit and Assessment Fund, whether by reimbursement, for whole cost work, or otherwise, or as Disbursing Agent, Rock Creek Park, D. C., nowhere appears. Whatever Mr. Petty's liability might have been, or may be, for any funds or moneys coming into his hands in any of the capacities set out in the declaration, no such liability attaches in the capacity of Auditor. Whether it exists in any other capacity is a question with which we are not now

concerned, nor will we attempt to deal with it until it is raised. These duties, if imposed upon Mr. Petty, were not and could not have been imposed upon him in his capacity as Auditor.

Even had the Commissioners undertaken, by an express order, to add such duties to the office of Auditor, such added duties would have been so far foreign to the nature of the office as to render the order of no further effect than to constitute him their personal—*not official*—agent in the premises, and *a fortiori*, not as Auditor.

Were such the case, it could not be that he is liable on his official bond for anything done or omitted in that connection merely because the agent designated by the Commissioners to perform these special duties, chances to be the giver of an official bond as Auditor. Smith vs. District of Columbia, 25 App. D. C., 370, 375; McGraw vs. Smith, 3 App. D. C., 405, 408.

It would seem to be evident, therefore, that the declaration states no cause of action against either the principal or the sureties on the bond under review; and it only remains to consider what distinction, if any, exists between the liability of the principal and of the surety in such a case as the present.

II.

The liability or non-liability in the case at bar must be determined by identically the same measure, with respect to principal and surety. The want of liability in the one case rests upon exactly the same ground as in the other. If the declaration does not show the failure of the principal to faithfully and efficiently perform the duties of his office as provided for by law, and the rules and regulations from time to time duly prescribed for the government of the Civil Service of the District of Columbia, or that he failed

to pay over, disburse and account for moneys that came into his hands as the law and orders governing said service required, and therefore fails to state a cause of action, it is because the acts complained of are not within the terms of the obligation sued upon, and, if not within such terms as to one of the parties, it cannot be so as to any of them.

> "It is doubtless true, that neither the surety nor his principal is responsible, by virtue of the bond, for money which the collector received, not as collector—money which his office did not require him to receive or disburse." Gaussen vs. United States, 97 U. S., 584, 591.

> "It is claimed by the appellees that it was no part of the official duty of the appellee, Hauser, as Treasurer of the City of Columbus, to negotiate and sell the water works bonds of said city, and, in this position, we think that the appellees are clearly right. * * * It seems clear to us that the action of the Common Council of the city of Columbus, in designating and authorizing the Treasurer of the said city to negotiate and sell the water works bonds did not charge the appellee, Hauser, the Treasurer of said city, with any official duty, as such Treasurer, in the premises; nor did the action of said appellee, in the negotiation and sale merely of said bonds, charge him officially, as City Treasurer, with any responsibility in the premises, but only in his individual character, as the agent of the Common Council by their appointment. The Common Council of said city were alone authorized by law to issue and sell the said bonds. If the appellee, Hauser, sold the said bonds, and assigned and delivered the same to the purchaser, as alleged in said paragraph, it is clear, we think, that he made such sale and delivery solely as the agent of the Common Council, and that he did not do so either as the Treasurer of said city or in any other capacity than as such agent. For what he may have thus done, as the agent

of the Common Council, it is certain that he could not be held liable officially, as Treasurer of said city, and that neither he nor his sureties can be held responsible therefor on his official bond." State vs. Hauser, 65 Ind., 105.

See, also, Boston vs. Moore, *et al.*, 3 Allen, 126; Eaton vs. Kelley, *et al.*, 72 N. C., 110; People vs. Tompkins, *et al.*, 74 Ill., 82; Turner vs. Collier, 51 Tenn., 89; McLendon vs. State, 92 Tenn., 520; Clark, *et al.*, vs. Logan County, *et al.*, 138 Ky., 676; Hawkins, *et al.*, vs. Thomas, 3 Ind. App., 399; State vs. Bagby, *et al.*, 100 Ind., 669.

It is accordingly respectfully submitted that the judgment of the Court of Appeals of the District of Columbia affirming the judgment of the Supreme Court of that District should be affirmed.

Respectfully,

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Attorney for Defendant in Error, James T. Petty.